United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

74-1835

United States Court of Appeals

For the Second Circuit.

SHATTUCK DENN MINING CORP.,
Plaintiff-Appellee-Appellant,

v.

WILLARD J. LA MORTE,
Defendant-Appellant-Appellee.

On Appeal From The United States District Court
For The Southern District of New York

JOINT APPENDIX

UNITED STATES COURT OF APPEALS
FILED
OCT 4 1974
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

BURNS, VAN KIRK, GREENE & KAFER
Attorneys for Plaintiff-Appellee-Appellant
521 Fifth Avenue
New York, N.Y. 10017
(212) 972-0500

FELDSHUH & FRANK
Attorneys for Defendant-Appellant-Appellee
144 East 44th Street
New York, N. Y. 10017
(212) 687-8930

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel.: (212) 447-5358

4

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

Page

Docket Entries A-1

Summons And Complaint A-2

Answer and Counterclaim A-7

Reply A-11

Motion For Leave To File Amended Answer And For Summary Judgment A-12

Affidavit of Willard J. La Morte In Support Of Motion A-18

Exhibits A, B, and C Printed At Pages A-2–A-11 ..... A-30

Exhibit B-1 – Proposed Amended Answer With Counterclaim ... A-31

Exhibits D-1 – D-3 – Statements A-35

Exhibits E-1 – E-2 – Statements A-38

Exhibit F-1 – F-2 – Statements A-40

Exhibits G-1 – G-4 – Statements A-42

Exhibits H-1 – H-4 – Statements A-46

Exhibit I–I-1 – Statements A-59

Exhibit J–Statement A-70

Exhibit K–Statement A-74

Affidavit of Donald C. Hain In Opposition To Motion A-75

Reply Affidavit of Willard J. La Morte In Support Of Motion A-98

Memorandum Decision of Wyatt, J., Denying Motion A-102

Pre-Trial Order A-105

Transcript of Hearing Held March 21, 22, 23, 1973 1

Colloquy 2

Donald C. Hain, for Government, direct 15
cross 45
redirect 05

Raymond J. Davies, for Plaintiff, direct 108

Dugald A. Cameron, for Plaintiff, direct 119
cross 122
redirect 138
recross 141

John G. Russell, for Plaintiff, direct 141
cross 159
redirect 192

Willard J. La Morte, for Plaintiff, direct 193
cross 249

Hugh A. Mac Mullan, III, for Defendant, direct 270
cross 286
redirect 305

Samuel Weiss, for Defendant, direct 306
cross 335

Willard J. La Morte, for Defendant, direct 337
cross 382

Plaintiff's Proposed Findings Of Fact
And Conclusions Of Law 390

Defendant's Proposed Findings Of Fact
And Conclusions of Law 393

Opinion of Carter, J. 396

Judgment 406

Notice of Appeal Of Willard J. La Morte, Defendant 407

Notice of Appeal of Shattuck Denn Mining Corp., Plaintiff 408

DOCKET ENTRIES

67 Civ. 3222 SHATTUCK DENNING MINING CORP. VS WILLARD J. LA MORTE 67 Civ. 3222

JUDGE CARTER

DATE	PROCEEDINGS	Date of Judgment
Aug. 23-67	Filed complaint & issued summons	
Aug. 30-67	Filed summons & return, served deft Willard J. La Morte by LeLand 8-28-67	
Sept.15-67	Filed stipulation and order extending defendant's time to answer complaint to 10/16/67. Edelstein, J.	
Oct.18-67	Filed ANSWER, and counterclaim.	SDHJ: HA:
Oct.23-67	Filed Reply of plaintiff to counterclaim.	
Apr.29-69	Filed Plff's Notice of change of address as of 4-30-69 from 521 Fifth Avenue, to 535 Fifth Avenue,NY 10017	
3-25-70	On call for revies - C. R. 2 Before Sugarman J.	
Mar 25-70	Filed order that pltff. shall file note of issue within 90days or action to be dismissed-Sugarman,Ch.J. m/n	
Apr 8- 70	Filed Stip & Order that Feldshuh & Frank of 144 E 44 St NYC be substituted as attys of record for deft. So Ordered: Clerk	
June 22-70	Filed pltff's NOTE OF ISSUE & statement of readiness	
Jul 14-70	Filed deft's affidavit & notice of motion to amend ans ret 7-21-70	
Jul 14-70	Filed deft's memo in support of amending answer	
Jul 20-70	Filed stipulation that deft's motion ret. 7-21-70 be adj. to 8-25-70	
Aug 24-70	Filed stipulation that deft's motion ret. 8-25-70 is adj. to 9-8-70	
Sep 3-70	Filed affdvt of Donald Hain (for pltff) in opposition to deft's motion to amend ans.	
Sep 3-70	Filed pltff's memorandum in opposition to deft's motions to amend ans. & summary Judg.	
Sep 17-70	Filed order pursuant to Cal. Rules 6 & 13-Sugarman,Ch.J.	
Sep 23-70	Filed deft's designation of trial counsel	
Sep 24-70	Filed pltff's designation of trial counsel	
Jan 29-71	Filed memo endorsed on motion filed 7-14-70---Motion is in all respects denied-So ordered-Wyatt,J. m/n	
Sep 28-71	Filed pltff's pre trial memorandum	
Sep 28-71	Filed deft's pre-trial memorandum	
Sep 28-71	Filed Consent Pre trial order-Edelstein,Ch.J.	
Mar.21,73	Before Judge Carter. (Non Jury Trial begun)	
Mar.22,73	Trial Cont'd.	
Mar.23,73	Trial Cont'd and Concluded.Decision reserved.Briefs by 6/1/73.Reply briefs June 11,73.	
Jun 1-73	Filed transcript of Record of Proceedings of March 2, 22, & 23, 1973.	
[illegible]	Filed transcript of proceedings dated March 21, 22, 23 '73	
Mar-6-74	Filed defendant LaMorte's trial memorandum	
Mar-6-74	Filed defendants reply memorandum	
Mar-8-74	Filed defendants post trial memorandum	
Mar-8-74	Filed pltf's post trial brief	
Mar-8-74	Filed plaintiffs post trial reply brief.	
Mar-8-74	Filed plaintiffs trial memorandum	
Mar-7-74	Filed plaintiffs proposed findings of fact	
Mar-8-74	Filed plaintiffs proposed findings and conclusions of law	
Mar-8-74	Filed defendants proposed findings of fact and conclusions of law	
Mar-8-74	Filed Opinion #40815...for all the reasons indicated, judgment will be entered against defendant for all the newly discovered "short swing" profits in accordance with this opinion. Settle order - Carter, J. m/n	
May-10-74	Filed Judgment and order #3222 that the plaintiff, Shattuck Denn Mining Corp., recover of the defendant, Willard J. LaMorte, the sum of $4,875.00, and its costs of this action. - Clerk.	
June-4-74	Filed defendants notice of appeal to the USCA for the 2nd Circuit from final judgment entered on 5-10-74 - copy mailed to Burns, Van Kirk, Greene & Kofer, Esqs.	
[illegible]	[illegible]	

Judgment entered on 5-10-74 - copy mailed to Feldshuh & Frank, Esq

A-2

SUMMONS AND COMPLAINT

SUMMONS IN A CIVIL ACTION — D. C. Form No. 45 Rev. (6-49)

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

_____ **DIVISION**

67 CIVIL ACTION FILE NO. 3222

SHATTUCK DENN MINING CORPORATION,

Plaintiff

v.

WILLARD J. LA MORTE,

Defendant

SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon

H.A. and C.E. HEYDT

plaintiff's attorneys, whose address is 521 Fifth Avenue, New York, N.Y. 10017

an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

John J. Olcan, Jr.
Clerk of Court.

E. Swanegan
Deputy Clerk.

Date: August 22, 1967 Aug. 23, 1967

[Seal of Court]

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -X

SHATTUCK DENN MINING CORPORATION,

Plaintiff,

CIVIL ACTION
NO. 67 3222

-against-

WILLARD J. LA MORTE,

COMPLAINT

Defendant.

- -X

1. This action arises under Section 16(b) of the Securities Exchange Act of 1934, U.S.C. § 78 p(b), and this Court has jurisdiction under said Section 16(b) and under Section 27 of said Act, 15 U.S.C. § 78aa, as amended.

2. During all the times hereinafter mentioned, SHATTUCK DENN MINING CORPORATION ("Shattuck Denn" hereafter) was and still is a corporation incorporated under the laws of the state of Delaware, with offices in the city and state of New York, in the county of New York, or the county of Kings, and was engaged in interstate commerce in the business of mining and manufacturing.

3. At all the times hereinafter mentioned, and particularly from June 30, 1963 through June 14, 1967, defendant was an officer and director of plaintiff, Shattuck Denn, and from June 14, 1967 through July 31, 1967, said defendant has been and still is a director of the plaintiff corporation.

4. During all the times hereinbefore mentioned, the capital stock of Shattuck Denn was an equity security registered on a national securities exchange, to wit, the American Stock Exchange, and was not and still is not an exempted security.

5. Between June 30, 1963 and July 31, 1967, while an officer and/or director of Shattuck Denn, defendant purchased and sold numerous shares of the capital stock of Shattuck Denn of which each purchase was made within a period of less than six months before or after a sale of such stock and each sale was made within a period of less than six months before or after the date of a purchase of such stock.

6. Included among the shares of capital stock of Shattuck Denn sold by the defendant during the times hereinbefore mentioned were shares of stock acquired by defendant as a stockholder of The Fireproof Products Co., Inc. ("Fireproof" hereafter), pursuant to the Agreement and Plan of Merger, dated September 14, 1965, and effective February 1, 1966, between Shattuck Denn, Fireproof, and Denn Holding, Inc.

7. Plaintiff and defendant have separately computed the amount of profits realized by defendant on purchases and sales during the aforesaid period, but are unable to agree on the value to be assigned to the shares of stock of Shattuck Denn acquired by defendant in

connection with the Fireproof merger, for the purpose of computing such profits.

3. Defendant has heretofore paid to plaintiff the sum of $38,432.98 on August 16, 1967, which sum includes interest computed by defendant to date of such payment, and the further sum of $1,856.64 on August 21, 1967, which sum includes interest computed by defendant to date of such payment, being the total amount of profits and interest which defendant computes to be due to plaintiff based on the assignment by defendant of a value of $10.75 to each share of Shattuck Denn stock acquired by defendant in connection with the Fireproof merger.

9. Plaintiff has duly demanded and defendant refuses to pay additional profits of $20,151.52 realized by defendant on purchases and sales of Shattuck Denn stock during the times hereinbefore mentioned, plus interest to date of payment, which additional profits are computed by plaintiff on the basis of assigning a value of $8.75 to each share of Shattuck Denn acquired by defendant in connection with the Fireproof merger, such being the mean market price of a share of Shattuck Denn stock on February 1, 1966, the effective date of such merger.

10. Substantially all of such purchases and sales were first brought to plaintiff's attention when defendant filed, on or about August 22, 1967 with the Securities and Exchange Commission and the American Stock Exchange, an

amended report pursuant to Section 16(a) of the Securities Exchange Act of 1934, as amended.

11. Two years have not elapsed since such profits were realized by defendant, or reports first filed, as required by Section 16(a) of the Securities Exchange Act of 1934, as amended, with respect to the purchases and sales upon which such profits were realized by defendant.

12. The shares of stock which were sold and purchased and/or purchased and sold by defendant were not acquired by defendant in good faith in connection with a debt previously contracted.

WHEREFORE, plaintiff demands judgment against the defendant by which the Court shall adjudge and decree that the defendant account for any profits realized by him from the purchase and sale and/or sale and purchase of the capital stock of Shattuck Denn made within periods of less than six months between the period from June 30, 1963 through July 31, 1967, and that he pay over the profits thus realized to the plaintiff, with interest.

H.A. and C.E. HEYDT

by W. Philip Van Kirk

W. Philip Van Kirk, Partner
Attorneys for Plaintiff
Office and P.O. Address
521 Fifth Avenue
New York, N.Y. 10017
Mu 2-6020

ANSWER AND COUNTERCLAIM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

SHATTUCK DENN MINING CORPORATION, :

Plaintiff, : CIVIL ACTION
67 No. 3222

-against- :

WILLARD J. LA MORTE, : ANSWER AND COUNTERCLAIM

Defendant. :

- - - - - - - - - - - - - - - - - - - -x

Defendant, WILLARD J. LA MORTE, by his attorneys, Sullivan, Donovan, Hanrahan, McGovern & Lane, answering the complaint herein,

FIRST DEFENSE

1. Alleges he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 10 thereof except that defendant admits that on or about August 22, 1967 he filed an amended report pursuant to §16 (a) of the Securities Exchange Act of 1934, as amended, with the Securities and Exchange Commission and the American Stock Exchange.

SECOND DEFENSE

2. Prior to the commencement of this action and on or about August 16, 1967 and August 21, 1967, defendant duly paid, satisfied and discharged the alleged claim of plaintiff set forth in the complaint herein by payment to plaintiff of the total amount of $40,289.62, which sum

represented all profits realized by defendant from the sale of the capital stock of plaintiff acquired on February 1, 1966 by defendant as a result of the merger of The Fireproof Products Co., Inc. (hereinafter "Fireproof") into Denn Holding, Inc. (hereinafter "Denn"), a wholly-owned subsidiary of plaintiff, based on the assignment of a purchase value of $10.75 for each share of plaintiff's stock.

3. The aforesaid value of $10.75 was the mean market price of a share of plaintiff's stock on December 3, 1964, the date on which plaintiff's Board of Directors approved the aforesaid merger of Denn and Fireproof, and was used to determine the amount of plaintiff's stock to be received in exchange for Fireproof's stock under the Agreement and Plan of Merger, dated September 14, 1965.

COUNTERCLAIM

4. Defendant has a claim against plaintiff arising out of defendant's aforesaid payment of $40,289.62 to plaintiff, the adjudication of which does not require the presence of third parties over whom the Court herein cannot acquire jurisdiction.

5. Defendant acquired the shares of plaintiff's stock which constitute the basis for plaintiff's claim herein on February 1, 1966, the effective date of the aforesaid merger of Denn and Fireproof.

6. Defendant's liability to plaintiff for profits realized by defendant from sales of plaintiff's stock within six months after their acquisition, as aforesaid, is measured by the fair market value of defendant's Fireproof stock at the time of its exchange for plaintiff's stock on February 1, 1966.

7. On information and belief, the fair market value of a share of Fireproof stock on February 1, 1966 was at least $146.04, which, on the basis of a ratio exchange of one share of Fireproof stock for 13.21 shares of plaintiff's stock, as provided for in the aforesaid Agreement and Plan of Merger, indicates that the consideration paid by defendant for plaintiff's stock was substantially in excess of $10.75 per share.

8. Defendant's payment to plaintiff of the total sum of $40,289.62 in August of 1967 was erroneously based upon a valuation of $10.75 as the cost of the stock acquired by defendant from plaintiff in connection with the Fireproof-Denn merger.

9. The net profits realized by defendant from his sales of plaintiff's aforesaid stock, for which he may be accountable to plaintiff under Section 16(b) of the Securities and Exchange Act of 1934, 15 U.S.C. §78 p (b), and the interest payable thereon, was therefore less than the $40,289.62 actually paid to plaintiff by defendant, and plaintiff has been unjustly enriched by said overpayment, reimbursement for which

defendant has demanded and plaintiff refuses to pay.

10. The exact amount of said overpayment is not presently known to defendant, but defendant prays that such amount be determined by the Court and that defendant have judgment against plaintiff therefor.

WHEREFORE, defendant demands judgment dismissing plaintiff's complaint and judgment for defendant against plaintiff on defendant's counterclaim for the amount to be determined by the Court, together with the costs and disbursements of this action.

SULLIVAN, DONOVAN, HANRAHAN,
McGOVERN & LANE

By: s/ Edward A. Silliere
A member of the firm
Attorneys for Defendant
70 Pine Street
New York, New York 10005
344 - 5858

REPLY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHATTUCK DENN MINING CORPORATION,

Plaintiff,

-against-

WILLARD J. LA MORTE,

Defendant.

CIVIL ACTION 67
NO. 3222

REPLY

Plaintiff, by its attorneys, H.A. and C.E. Heydt, for its reply to the counterclaim herein:

1. Denies the allegations of Paragraphs "4" through "10" inclusive of the answer.

WHEREFORE, plaintiff demands judgment dismissing the counterclaim and judgment for plaintiff against defendant as demanded in the complaint.

H.A. and C.E. HEYDT

by s/ W. PHILIP VAN KIRK

Attorneys for Plaintiff
521 Fifth Avenue
New York, N. Y. 10017
Mu 2-6020

MOTION FOR LEAVE TO FILE AMENDED ANSWER
AND FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

SHATTUCK DENN MINING CORPORATION,

Plaintiff,

- against -

WILLARD J. LA MORTE,

Defendant.

67 Civ. 3222

MOTION FOR LEAVE TO FILE AMENDED ANSWER AND FOR SUMMARY JUDGMENT

- - - - - - - - - - - - - - - - - - - -x

SIRS:

PLEASE TAKE NOTICE that upon the affidavit of WILLARD J. LA MORTE, duly sworn to the 6 day of July, 1970, and upon the pleadings and proceedings heretofore had herein, the defendant will move this Court at a Motion Part to be held at the United States Court House, Foley Square, Room 506, New York, New York, on the 21 day of July, 1970, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an Order:

1. Pursuant to Rule 15 of the Federal Rules of Civil Procedure, for leave to file an Amended Answer, a copy of which is submitted herewith as EXHIBIT "B$_1$", on the ground that justice so requires in that defendant's Answer does not fairly present his total defense to this action and the merits of his Counterclaim; and no prejudice will be done to plaintiff by permitting said amendment.

2. Pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting a summary judgment in the defendant's favor dismissing the Complaint and for the relief demanded in defendant's Counterclaim, on the ground that there is no genuine issue as to any material fact, and that

defendant is entitled to a judgment as a matter of law.

Dated: New York, New York
July 6, 1970

Yours, etc.

FELDSHUH & FRANK

By _____

Attorneys for Defendant
Office & P.O. Address
144 East 44th Street
New York, N.Y. 10017
Tel. No.: MU 7-8930

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

SHATTUCK DENN MINING CORPORATION,

Plaintiff,

-against-

Civil Action Number
67 Civ 3222

WILLARD J. LA MORTE,

Defendant.

----------X

Movant's Statement, Pursuant To Rule 9(g) General Rules For The Southern and Eastern Districts, of Material Facts as to which, for the Purposes of this Motion, There are No Genuine Issues To Be Tried.

1. During the period 1963 through 1967, plaintiff was a corporation, an equity security of whose was registered on a national securities exchange, i. e., the American Stock Exchange.

2. During the said period, defendant was an officer/director or director of the plaintiff.

3. During the said period, defendant was a member of four partnerships, i.e., Joint Stock Traders; Sanford Boulevard Venture; Willard J. LaMorte, Agent; and Willard J. LaMorte, Partnership.

4. No such partnership deputed the defendant to sit upon the Board of Directors of the plaintiff, nor to act in its interests either as an officer or director of the plaintiff, nor did the defendant so act.

5. During the said period, defendant's percent participations in the above named partnerships were:

(a) Joint Stock Traders - 1964 - 26.393%;

(b) Sanford Boulevard Venture - 1964 - 25.0%;

(c) Willard J. LaMorte, Agent - 1964 - 19.67%; 1965 - 14.62%; 1966 - 11.18%; 1967 - 12.61%.

(d) Willard J. LaMorte, Partnership - 1964 - 33.2822%; 1965 - 34.0329%; 1966 - 34.1733%; 1967 - 35.307%.

6. During the said period, the above named partnerships made purchases and sales of plaintiff's capital stock.

7. The aforementioned purchases and sales were reflected in plaintiff's stock transfer book, the sheets of which were available to and examined by the plaintiff.

8. During the said period, the defendant made no purchases or sales for his personal account of plaintiff's capital stock.

9. On February 1, 1966, and pursuant to a Plan and Agreement of Merger, defendant exchanged shares of the capital stock of The Fireproof Products Co., Inc. (Fireproof) owned by him for shares of the capital stock of the plaintiff, at an exchange ratio of 13.21 shares of plaintiff's stock for each share of Fireproof's stock.

10. The exchange ratio was fixed by the ratio of the per share book value of Fireproof's stock on December 31, 1964 ($141.85) and the per share market value of plaintiff's stock on the American Stock Exchange on December 3, 1964, when plaintiff's Board of Directors approved the exchange in principal ($10.75).

11. On February 1, 1966, the exchange date, the per share market value of plaintiff's stock on the American Stock Exchange had dropped to $8.75.

12. On February 1, 1966, the exchange date, the per share book value of Fireproof's stock had increased to $146.04.

13. Based upon the exchange ratio of 13.21, the per share cost of plaintiff's stock on the exchange date was at minimum $11.05 plus $2.00 ($10.75 - 8.75) or the sum of $13.05.

14. At plaintiff's request, and in August, 1967, defendant submitted to Weiss, Berman & Sessler, plaintiff's Certified Public Accountants, records and original brokerage statements which reflected transactions in plaintiff's capital stock during the period June 30, 1963, through July 31, 1967, in which defendant had, or might be held to have, directly or indirectly, an interest.

15. Based upon defendant's submission, and for the said period, the plaintiff's Accountants matched purchases and sales and sales and purchases, and thereupon represented to defendant and plaintiff that they had accurately calculated profits (in accordance with the provisions of Section 16(b)) received by defendants, and recoverable by plaintiff.

16. Plaintiff's Accountants indiscriminately lumped together all trades made during the said period and matched purchases and sales irrespective of who made the same.

17. The Accountants failed to match trades of each partnership separately, then calculate the aggregate "profit", if any, realized by each partnership, and ascertain the "profit" realized by the defendant, if any, by applying his percent participation in each partnership for the year in which the profit was realized.

18. The Accountants failed to calculate "profit" solely upon the matching of trades made <u>less</u> than six months apart.

19. The Accountants failed to calculate "profit" solely upon the matching of trades made no more than two years prior to the commencement of this action.

20. The Accountants matched the shares, received by the defendant upon the exchange, to shares sold by the partnerships, notwithstanding the fact that defendant still holds such shares and has made no sales of stock for his own account.

21. Based upon plaintiff's Accountants' calculations and representations, and in discharge of his asserted liability, defendant paid to plaintiff the sum of $38,432.98 on August 16, 1967, and the further sum of $1,856.64 on August 21, 1967.

22. Though retained, the aforesaid payments were not accepted by plaintiff in discharge of defendant's asserted liability; rather, plaintiff claimed that there was due from defendant an additional $20,151.52 (based upon its determination that the cost to defendant of its shares on the exchange of Fireproof stock was $8.75 per share), for which sum plaintiff demanded payment.

23. Defendant thereupon requested a recalculation of "profits" alleged to be due, which request was denied by plaintiff, whereupon defendant refused to make any additional payment and demanded a return of excess sums paid, which plaintiff refused.

24. On August 23, 1967, plaintiff commenced this action.

25. On October 16, 1967, defendant, by his answer, counterclaimed for the sum overpaid by him.

AFFIDAVIT OF WILLARD J. LA MORTE IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

SHATTUCK DENN MINING CORPORATION,

Plaintiff,

- against -

WILLARD J. LA MORTE,

Defendant.

Civil Action Number
67 Civ. 3222

AFFIDAVIT

- - - - - - - - - - - - - - - - - - - -x

STATE OF NEW YORK)
ss:
COUNTY OF NEW YORK)

WILLARD J. LA MORTE, being duly sworn, deposes and says:

By its action, plaintiff seeks to impose a liability for alleged "short swing profits", to which it is not entitled.

Plaintiff's Complaint was filed on August 23, 1967, to recover "short-swing" profits allegedly realized by me during the period June 30, 1963 through July 31, 1967 while I was an officer-director or director of the plaintiff (Exhibit A).

My Answer to the Complaint, with Counterclaim for unjust enrichment, was served on October 16, 1967 (Exhibit B and B_1). Reply was made on October 23, 1967 (Exhibit C).

Representing me at the time of my Answer was the law firm of SULLIVAN, DONOVAN, HANRAHAN, McGOVERN & LANE, ESQS.

On or about April 7, 1970, by Stipulation dated March 30, 1970, the firm of SULLIVAN, DONOVAN, HANRAHAN, McGOVERN & LANE was substituted by the law firm of FELDSHUH & FRANK, my present attorneys.

Upon analysis of the pleadings, and the facts, circumstances and documents relating to this litigation, my present attorneys advised that my Answer failed to present the full merits of my substantial defenses to the asserted claims of plaintiff. Hence, leave to amend my Answer is hereby requested. Plaintiff is not prejudiced by this application because in no way do the issues raised by the amendment present matters which could not have been anticipated upon the service of the Complaint.

Prior to the commencement of this action in 1967, plaintiff demanded that I provide for its examination documents and brokerage statements from which its Certified Public Accountants could ascertain what profits were realized by me from trades in plaintiff's capital stock. I voluntarily did so, relying upon plaintiff's Accountants and lawyers for the accuracy of their calculations as well as my liability under the Securities Acts.

Based upon plaintiff's Accountants' calculations, and my reliance upon their accuracy, I made payment to the plaintiff of the sum of $40,289.62 in discharge of my "obligation" to the plaintiff for "short-swing" profits.

Following this payment, plaintiff's lawyers then came forward with their calculation, and to my amazement demanded an additional payment of $20,151.52. When I refused to make such further payment, the plaintiff started this action.

My former attorneys advised that not only was plaintiff's suit without merit, but also I had overpaid when I paid the aforesaid $40,289.62. Hence, I counterclaimed to recover the excess. My present attorneys, as heretofore stated, in their view assert that the extent of my liability

had been grossly distorted and that my liability in fact is $6,268.99.

The foregoing is the factual background for my application for leave to amend my answer. By granting such permission, the Court will then have before it a clear presentation of the issues and the correct measure of my responsibility herein.

Plaintiff will not be prejudiced by such amendment; it has not changed in any way its position in reliance upon the Answer as previously filed.

On the other hand, failure to permit amendment will retain the penal features of plaintiff's action to my severe prejudice, a result nowhere mandated by the Securities Acts.

The significant points, obscured by my Answer to the Complaint, and requiring clear and plain delineation as set forth in my proposed Amended Answer are:

A. The failure to exclude from the calculation, trades made more than two (2) years prior to the commencement of this suit (See POINT IV, DEFENDANT'S MEMORANDUM); and

B. The failure to match one to the other, transactions only of the individual partnerships in which I was a member, to ascertain the profit realized by each of them, and to charge me with only my distributive shares of the same. (See POINT I, DEFENDANT'S MEMORANDUM):

C. The failure to match trades made only within a period of less than six (6) months. (See POINT III, DEFENDANT'S MEMORANDUM).

D. The failure to exclude from the calculation shares purchased but never sold by me; and in any event, to value the cost to me of such shares (upon the exchange by me of the capital stock of THE FIREPROOF PRODUCTS CO. INC. (FIREPROOF) for plaintiff's capital stock) at minimum, as the market value of the FIREPROOF stock on the exchange date. (See POINT II, DEFENDANT'S MEMORANDUM).

The cumulative effect of these points is to clearly demonstrate that plaintiff had been paid in full, and was unjustly enriched in the sum of $34,020.63.

SUMMARY JUDGMENT

A. Partnership Transactions:

Included in the documents supplied to plaintiff's Accountants were transactions in plaintiff's capital stock by four partnerships in which I held minor participations. These partnerships, and my percent participation therein, were as follows:

a) WILLARD J. LA MORTE, AGENT, (Exhibits D_1, D_2, D_3).

Years ending:

1964	1965	1966	1967
19.67%	14.62%	11.18%	12.61%

b) JOINT STOCK TRADERS

1963 to June 30, 1964 (when shares were transferred to WILLARD J. LA MORTE, PARTNERSHIP) - 26.393% (Exhibits E_1, E_2).

c) SANFORD BOULEVARD VENTURE

1963 to June 30, 1964 (when shares were transferred to WILLARD J. LA MORTE, PARTNERSHIP) - 25.0% (Exhibits F_1, F_2).

d) WILLARD J. LA MORTE, PARTNERSHIP (Exhibits G_1, G_2, G_3, G_4).

Years ending:

1964	1965	1966	1967
33.2822%	34.0329%	34.1733%	35.307%

I did not become an officer-director of plaintiff because of my membership in these partnerships. Nor was I appointed by these partnerships, or any of their members, to represent them on plaintiff's Board. I reported to none of the partners on the activities of the plaintiff.

In addition to myself, other members of the partnerships, their relation to me, if any, and their percent ownership, were:

a) WILLARD J. LA MORTE, AGENT (Exhibits D_1, D_2, D_3).

	1964	1965	1966	1967
Mignon S. LaMorte (wife)	9.06%	9.32%	10.50%	11.08%
Mignon LaM. Lawless (child)	.48	.84	.68	11.89
William F. LaMorte II (child)	12.99	11.56	19.07	15.42
Thomas E. LaMorte (child)	18.07	18.47	27.13	22.73
Debra LaMorte (child)	13.71	13.17	7.56	3.01
Lisa LaMorte (child)	18.28	19.37	14.48	12.58
Rita LaMorte (child)	4.32	6.80	5.19	5.53
Anne LaMorte (child)	3.42	5.85	4.21	5.15

b) JOINT STOCK TRADERS (Exhibits E_1, E_2).

	1964
Grace Lyons (sister)	3.614%
Elizabeth Seely (no relation)	14.004
Howard W. LaMorte (brother)	22.401
Richard P. LaMorte (brother)	5.666
William F. LaMorte (father)	27.882

c) SANFORD BOULEVARD VENTURE (Exhibits F_1, F_2).

	1964
Robert A. MacLeary (no relation)	25.0%
Howard W. LaMorte (brother)	25.0
William F. LaMorte (father)	25.0

d) WILLARD J. LA MORTE PARTNERSHIP (Exhibits G_1, G_2, G_3, G_4).

	1964	1965	1966	1967
Robert A. MacLeary (no relation)	15.1178%	15.4588%	15.5225%	16.038%
Elizabeth Seely (no relation)	4.4666	4.5673	4.5862	4.738
William F. LaMorte (father)	22.9297	23.4612	23.7937	23.061
Howard W. LaMorte (brother)	21.8461	20.0690	19.5036	18.360
Richard P. LaMorte (brother)	1.2082	1.2355	1.2406	1.277
Grace Lyons (sister)	1.1494	1.1753	1.1801	1.219

Transactions in plaintiff's capital stock, for the period alleged in the Complaint, by each of the abovenamed partnerships, were compiled and are set forth in EXHIBITS "H_1", "H_2", "H_3" and "H_4" respectively.

Upon examination of the Accountants' records, my attorneys found to their amazement that instead of matching separately trades of each partnership to ascertain the profit realized by it, and then charging me for my distributive share, all trades were erroneously lumped together and transactions matched, irrespective of which entity made the sale or the purchase.

This procedure was clearly improper, and could not form the basis for the determination of profits realized by me. (See POINT I, DEFENDANT'S MEMORANDUM).

B. Calculation of the Six Month Period:

On two occasions, trades which were made more than a period of "less than six months" apart were matched to ascertain profits. (See listing of transactions in plaintiff's stock calculated by the Accountants - EXHIBIT "I").

The match of 315 shares on "11/19/63" with two transactions totalling 315 shares on "5/18/64", is a match of transactions exactly six months apart.

The match of 200 shares on "12/31/64" (which forms

a part of 6 transactions aggregating 1000 shares) with two transactions totalling 1000 shares on "6/30/65" is a match of transactions exactly six months apart.

Both matches are clearly outside the statute. The alleged profit was therefore erroneously included and falls within my counterclaim. (See POINT III, DEFENDANT'S MEMORANDUM).

C. Profit Calculated Upon Trades Made More Than Two Years Prior to Commencement of Action:

Plaintiff's action was commenced upon the filing of its Complaint on August 23, 1967.

The calculations of the Accountants include trades effected, and reflected upon the plaintiff's transfer books, prior to August 24, 1965, the date exactly two years prior to the filing of the Complaint. Transfer sheets were regularly made available to plaintiff for its examination.

This inclusion is demonstrably erroneous as set forth in the Memorandum filed with these papers and the prior transactions should not be included in the calculations of profit. (See POINT IV, DEFENDANT'S MEMORANDUM).

D. Valuation of Purchase Price of Plaintiff's Stock:

During the period presented by plaintiff's Complaint, I made no purchases or sales for my account of the plaintiff's capital stock.

On February 1, 1966, as a result of an exchange of shares of THE FIREPROOF PRODUCTS CO., INC. (FIREPROOF) pursuant to an Agreement and Plan of Merger dated September 14, 1965, between plaintiff, The Fireproof Products Co., Inc. and Denn Holding, Inc. (a wholly-owned subsidiary of plaintiff), each Shareholder of FIREPROOF received 13.21

shares of plaintiff's stock for each share of FIREPROOF stock exchanged. I received 19,616 shares of plaintiff's capital stock on this exchange. (See list of Shareholder Exchanges, EXHIBIT "J"). The exchange ratio was formulated upon the book value of FIREPROOF as at December 31, 1964 and the market value of plaintiff's stock as at December 3, 1964. No provision was made in the Agreement for the possible change in the value of either corporation's stock between the date of the Agreement and the exchange date (February 1, 1966).

On February 1, 1966, the mean market value of plaintiff's stock was $8.75, fully $2.00 below its mean market value used in the Contract of Merger. (Nevertheless plaintiff, on March 2, 1966, offered to acquire the fractional interests resulting from the exchange, at $10.75 per share (See list of Shareholder Exchanges, Exhibit "J").

Immediately prior to the exchange date, the book value of FIREPROOF stock, according to its Balance Sheet of January 28, 1966 (EXHIBIT "K") was $1,708,964.01, or approximately $146.04 per share -- an increase of $4.19 per share over its per share book value as used to ascertain the exchange ratio. Since there was no modification of the exchange ratio to reflect the decrease in value of plaintiff's shares and the increase in value of Fireproof's shares, the per share cost of plaintiff's stock to me increased by $2.30 to a total per share cost of $13.05 (See defendant's memorandum, p. 13).

In the exchange plaintiff was acquiring ownership of a profitably run business. It could reasonably expect that this acquisition would enhance its own financial structure. Since Fireproof's shares were not traded in

any national securities market, the cost to defendant should be adjusted to reflect this valuable intangible (See DEFENDANT'S MEMORANDUM, p. 15). The Accountants' listing of matched transactions (EXHIBIT "I") improperly valued my cost at $8.75 per share (the market value of plaintiff's stock on the date of exchange).

Although I still hold those shares, the Accountants matched them against sales of plaintiff's capital stock made by the partnerships. Such an incredible result stems from the lumping together of all purchases and sales regardless of the entity making the same.

E. Calculation of Recoverable Profit Realized and Overpayment:

Giving effect to the above mentioned facts, and to the law set forth in the accompanying Memorandum, recoverable profit realized by me can be calculated by:

a.) Excluding all transactions made before August 24, 1965;

b.) Matching only purchases and sales, or sales and purchases made less than six months apart;

c.) Matching only transactions of like entities, and charging me only with my distributive share of the profit realized by each entity.

Personal Transactions:-

1) I still hold my shares received upon the exchange of FIREPROOF stock, and since I made no other sales for my account during the period covered by the Complaint, I realized no profit on trades for my own account.

2) Transactions of Joint Stock Traders and Sanford Boulevard Venture:-

All trades in Joint Stock Traders and Sanford Boulevard Venture were made prior to August 24, 1965 (See EXHIBITS "H_2" and "H_3" respectively), therefore I realized no recoverable profits from those transactions.

3) Transactions of Willard J. LaMorte, Agent: Trades are set out in EXHIBIT "H_1". By excluding trans-

actions prior to August 24, 1965, and matching purchases to sales on the basis of "lowest in - highest out", the partnership realized an aggregate of $257.00. Applying my percent ownership to this figure, to wit: 14.62% for 1965 and 11.18% for 1966; the profit realized by me from this partnership totalled $33.58.

The following table presents the foregoing:

	Purchased	Sold
10/27/65	$7.64 - 200 shares	
11/23/65		$9.05 - 100 shares
1/6/66		$8.80 - 100 shares

$9.05 - 7.64 = $1.41 x 100 = 141.00 x 14.62% = $20.61

$8.80 - 7.64 = $1.16 x 100 = 116.00 x 11.18% = $12.97

Total Profit = $33.58

4) Transactions of Willard J. LaMorte, Partnership:- Trades are set out in EXHIBIT "H4".

Excluding transactions prior to August 24, 1965, and matching the lowest purchases to the highest sales within a period of six months, the partnership realized $17,730.00 ($432.00 of which was realized in 1965 $1,580.00 in 1966, and the balance in 1967). Applying my percent ownership for the years 1965, 1966 and 1967 (34.0329%, 34.1733% and 35.30% respectively), the profit realized by me from this partnership totalled $6,235.40.

The following table presents the foregoing:

Purchased	Sold	Profit
9/3/65 - 200 - $8.15	2/4/66 - 200 - $9.58	1966 - $286
9/3/65 - 100 - 8.15	1/14/66- 100 - 9.30	1966 - 115
9/3/65 - 100 - 8.15	11/22/65-100 - 9.19	1965 - 104
9/3/65 - 100 - 8.15	11/18/65-100 - 9.06	1965 - 91
9/3/65 - 200 - 8.15	11/5/65 -200 - 8.94	1965 - 158
9/3/65 - 100 - 8.15	11/19/65-100 - 8.94	1965 - 79

Purchased			Sold			Profit	
9/3/65	- 200 -	$ 8.15	1/6/66	- 200 -	$ 8.57	1966 -	$ 84
9/3/65	- 100 -	8.15	1/18/66	- 100 -	8.32	1966 -	17
9/6/66	- 200 -	7.14	2/16/67	- 200 -	13.81	1967 -	1334
9/6/66	- 100 -	7.27	2/16/67	- 100 -	13.81	1967 -	654
9/2/66	- 800 -	7.46	2/16/67	- 500 -	13.81	1967 -	3175
			2/15/67	- 300 -	13.19	1967 -	1719
9/1/66	- 400 -	7.83	2/15/67	- 400-	13.19	1967 -	2144
8/29/66	- 600 -	8.28	2/15/67	- 500 -	13.19	1967 -	2455
			2/8/67	- 100 -	12.67	1967 -	439
8/26/66	- 200 -	8.55	2/8/67	- 200 -	12.67	1967 -	824
8/26/66	- 600 -	8.78	2/8/67	- 500 -	12.67	1967 -	1945
			2/9/67	- 100 -	12.63	1967 -	385
8/18/66	- 200 -	9.41	2/9/67	- 200 -	12.63	1967 -	644
5/23/66	- 400 -	10.03	6/10/66	- 200 -	12.28	1966 -	450
			6/9/66	- 200 -	11.80	1966 -	354
5/12/66	- 200 -	10.43	6/9/66	- 200 -	11.80	1966 -	274

Total Partnership Profit - $17,730

1965 - 432 x 34.032% = $147.02
1966 - 1580 x 34.173% = 539.93
1967 -15718 x 35.30% = 5,548.45

$6,235.40 - Total Distributive Share

The sum of the distributive shares of the partnership profits realized (the sole and total recoverable profit realized by me) was $6,268.99.

Plaintiff's assertion of an aggregate liability of $56,566.36 is a gross distortion of my true obligation. So too, my payment of $40,289.62, based upon the inaccurate calculations and representations of plaintiff's Accountants and Attorneys, unjustly enriched plaintiff in the sum of $34,020.63. The imposition of such a penalty cannot be sanctioned by the Court.

WHEREFORE, it is respectfully requested that Defendant's motion be granted in all respects, that:

a) Defendant be permitted to amend his Answer in the form attached hereto;

b) the allegations of Defendant's counterclaim be deemed denied by the Plaintiff;

c) Defendant be awarded judgment dismissing Plaintiff's complaint and action;

d) Defendant be awarded judgment on its counterclaim for the sum stated therein, together with interest from the date of the overpayment, costs and disbursements; and

e) such other relief as the Court may deem just.

Sworn to before me this
6 day of July, 1970.

S/
WILLARD J. LaMORTE

WYNNE B. STERN, JR.
Notary Public, State of New York
No. 60-2R4[illegible]97
Qualified in Westchester County
Commission Expires March 30, 19[illegible]7

EXHIBITS A, B, AND C ANNEXED TO THE AFFIDAVIT OF WILLARD J. LA MORTE IN SUPPORT OF MOTION WERE PREVIOUSLY PRINTED AT PAGES A-2 – A-11

EXHIBIT B-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHATTUCK DENN MINING CORPORATION,	:	Civil Action Number 67 Civ 3222
Plaintiff,	:	
-against-	:	PROPOSED AMENDED ANSWER WITH COUNTERCLAIM
WILLARD J. LA MORTE,	:	
Defendant.	:	

Defendant for his Amended Answer:

1. Denies the allegations in paragraphs "1", "5", "6", "10", and "11" of the Complaint.

2. Admits the allegations in paragraph "2", but alleges as of the date hereof, plaintiff's offices are in Bronx County, New York.

3. Admits the allegations in paragraph "3", but alleges that defendant ceased to be a director of the plaintiff on or about June 1, 1968.

4. Denies the allegations in paragraph "4", except admits that plaintiff's capital stock was listed and traded on the American Stock Exchange.

5. Denies the allegations in paragraph "7" and alleges the value of each Fireproof share on February 1, 1966 was approximately $146.04.

6. Denies the allegation in paragraph "8" and alleges that the computation made by plaintiff's accountants was erroneous and the payments set forth in paragraph "8" totalling $40,289.62 were made by defendant relying upon the represented accuracy of the computation by plaintiff's accountants.

7. As to paragraph "9" of the Complaint, defendant admits that plaintiff demanded a further payment of $20,151.52 and that defendant refused to pay the same, and except as admitted aforesaid defendant denies that the said sum of $20,151.52 is due and owing to the plaintiff.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE:

8. Plaintiff does not allege a claim upon which relief can be granted.

AS AND FOR A COUNTERCLAIM:

9. Prior to the commencement of this action and on or about August 16, 1967 and August 21, 1967, defendant paid the sum of FORTY THOUSAND TWO HUNDRED EIGHTY-NINE DOLLARS AND 62/100 ($40,289.62), which sum the defendant was made to believe by plaintiff represented profits realized from the purchases and sales and sales and purchases of the capital stock of plaintiff and the monies to which plaintiff was entitled to be paid by defendant under the Securities Act of 1934.

10. After the said payment of FORTY THOUSAND TWO HUNDRED EIGHTY-NINE DOLLARS AND 62/100 ($40,289.62) to the plaintiff, defendant learned that said $40,288.62 was based upon the erroneous calculation of plaintiff's Accountants, in that purchases and sales were matched, the profit from which:

a. Was not realized within two (2) years from the commencement of this action;

b. Did not represent the proportionate share of profits realized by the defendant from the trades of partnerships in which he was a member;

c. Did not represent transactions within six (6) months of each other; and

d. Were calculated upon the basis that the consideration paid by the defendant upon the exchange of capital stock of THE FIREPROOF PRODUCTS CO. INC. for capital stock of the plaintiff, upon the merger of THE FIREPROOF PRODUCTS CO. INC. into DENN HOLDING INC., a wholly owned subsidiary of plaintiff, equalled the mean market value of plaintiff's capital stock instead of the market value of THE FIREPROOF PRODUCTS CO. INC. stock on the day of the exchange--February 1, 1966.

11. Upon information and belief, the fair market value of a share of capital stock of THE FIREPROOF PRODUCTS CO. INC. on February 1, 1967 was in excess of $146.04 which, on the basis of a ratio exchange of one (1) share of such stock for 13.21 shares of the plaintiff's stock, as provided for in the Agreement and Plan of Merger, establishes that the consideration paid by defendant for plaintiff's stock was substantially in excess of $10.75 per share.

12. The net profits realized by defendant from his purchases and sales and sales and purchases of plaintiff's common capital stock, for which he may be accountable to plaintiff under Section 16(b) of the Securities and Exchange Act of 1934, 15 U.S.C., Sec. 78P(b), and the interest payable thereon, if any, was thereby considerably less than the $40,289.62 actually paid to plaintiff by defendant, and plaintiff has been unjustly enriched by the said payment to the extent of $34,020.63 reimbursement of which defendant has demanded and plaintiff refuses to pay.

WHEREFORE, defendant demands judgment dismissing the plaintiff's Complaint, and judgment for the defendant against

the plaintiff on defendant's counterclaim, in the amount of $34,020.63, together with interest and the costs and disbursements of this action.

FELDSHUH & FRANK

By_____

Attorneys for Defendant
Office & P. O. Address
144 East 44th Street
New York, N. Y. 10017
Tel. No. MU 7-8930

WILLARD J. LA MORTE, AGENT

December 31, 1964

Assets		Liabilities & Capital	
Cash	1578r4	Owing Broker	r84131
Investments	148 18176	Capital	101346
Total	149760-	Total	149760-

Income Statement:

Dividends Income		r86935	
Interest Income		38r	
Capital Gain - Short Term Gain		38r867	
" " Long Term Loss		(19779)	47179
Expenses - Interest		348711	
Bookkeeping and Tax Service		650-	
State Transfer Taxes		r0890	
Financial Service		72-	41801
Net Income			r999

Capital Accounts:

Partners			Profit p/o	1-1-64 Capital	Additional Capital	Income	Withdrawals	12-31-64 Capital
Willard J. LaMorte			19.67	r400114	46795o	5877	6800-	19 3963
Simon S.	"	"	906	1347069	r98075	r717	7r9656	3 18r01
Vincent	"	"	48	1r41661	150-	144	1r07665	49146
Wm. F.	"	II	1r99	1410775	343-	3396	13r401	13165r6
Thomas E.	"	"	180	r0347351	47475	5419	r56104	1 0315r5
Edward A.	"	"	1371	1560345	100-	4112	1850-	13 39457
Lisa A.	"	"	1878	r1r44434	100-	5148	r86r70	18 5169
Sara A.	"	"	432	4r05446	160-	1r97	00	4378r3
Anne L.	"	"	342	3r93081	160-	1046	00	3463134
Totals			10000	1766693 7	9148-	r999r	34770 46	101346 8

EXHIBIT D-2

Willard J. La Morte, Agent

December 31, 1965

Assets		Liabilities & Capital	
Cash	1906.36	Liabilities	none
Due from Broker	657.32	Capital	98707.54
Investments	96143.91		
Total	98707.54	Total	98707.54

Income Statement:			
Dividend Income		4488.08	
Interest Income		171.45	
Capital Gain - Short Term Loss		(137.13)	
" Long Term Gain		4436.55	6558.75
Expenses - Interest		3457.35	
Bookkeeping and Tax Service		45.-	
Financial Services		75.-	3577.35
Net Income			2981.40

Capital Accounts:

Partners	Profit & Loss %	1-1-65 Capital	Additional Capital	Income	Withdrawals	12-31-65 Capital
Willard J. La Morte	14.67	14439.63	367.-	377.11	645.-	14433.74
Simon S. "	9.34	9184.05	177.-	440.40	2000.-	9199.45
Richard T. "	8.4	491.40	315.-	467.67	.00	8807.07
Wm. F. " III	11.56	13165.40	5145	498.18	2586.00	11407.03
Thomas F. "	18.47	18315.45	553.71	476.41	1115.40	18299.97
Debra A. "	13.17	13894.57	105.-	339.71	1340.70	12998.58
Lisa A. "	19.37	19516.96	106.10	499.63	.00	19422.69
Rita A. "	6.80	4378.43	216.-	175.40	.00	6713.83
Anne L. "	5.85	3463.34	216.-	150.89	.00	5774.23
Totals	100.00	101346.83	805.06	2979.40	13794.70	98707.54

EXHIBIT D-3

Willard J. La Morte, Agent

December 31, 1966

Assets		Liabilities & Capital	
Cash	131381	Liabilities	none
Investments	847370	Capital	1598651
Loan Receivable	76075-		
Total	1598651	Total	1598651

Income Statement:

Dividend Income	46184	
Interest Income	10019	
Capital Gain - Short Term Loss	(91097)	
" " Long Term Gain	64317	1701
Expenses - Interest	1111	
Tax Service	150-	
Miscellaneous	1037	
Net Income		

Capital Accounts:

Partners	Profit %	1-1-66 Capital	Additional Capital	Income	Withdrawals	12-31-66 Capital
Willard J. La Morte	11.18	1443374	430195	97910	3835-	1
Mignon S. "	10.50	919945	57936	79195	1005-	1
Simon T. Lawless	.68	8807	7-	1810	.00	1
Wm. F. La Morte II	19.07	1140703	171436	50853	31436	3
Thomas E. "	17.13	1840997	196055	77975	16975	4
Debra A. "	7.56	199858	17-	01449	3038	1
Lisa A "	14.48	191769	17-	38584	.00	2
Rita A "	5.19	67383	196-	13896	.00	
Anne L "	4.11	57743	84-	1183	150-	
Totals	100.00	9870759	4753777	664670	130955	15

EXHIBIT E-1

Joint Stock Traders

1963

December 31, 1963

Cash	761 7[illegible]	Due Brokers			[illegible]09 [illegible]309.[illegible]
Bond Interest Accrued	7379	Note Payable			77500 -
Stocks - Cost	508 779 66	Capital			[illegible]2 [illegible]781.[illegible]
	509 615 17				509 615 17

	Capital 1/1/63	Income %	Income Amount	Withdrawals	Capital 12/31/63
Grace Lyons	76 19 [illegible]9	3.614	43 548		82 [illegible]4 9
Elizabeth Seely	[illegible]96 [illegible]04 7	1.044	169 [illegible]30		31 30 [illegible]7
Howard W. LaMorte	[illegible]7 [illegible]4 86	[illegible]401	[illegible]6 9931		[illegible]99 [illegible]
Richard P. LaMorte	[illegible]19 45 78	5 666	69 [illegible]76	10000 -	[illegible]2 665
William F. LaMorte	58 785 [illegible]6	[illegible]7 984	3 [illegible]59 77		6 [illegible]45 0[illegible]
Willard J. LaMorte	55 645 38	[illegible]6 393	3 [illegible]80 3[illegible]		58 [illegible]5 7[illegible]
Totals	[illegible]40 834 [illegible]4	100.000	1 [illegible]04 9.9[illegible]	10000 -	[illegible]2 884 [illegible]

1963 Income:	Capital Gain - S/T	10 975 73	
	" " L/T	3 [illegible]5 063	
	Qualifying Dividends	709 450	[illegible]3 310 96
	Ordinary Income - Loss		([illegible]9 [illegible]60 8.[illegible])
	1963 Income		1 [illegible]04 9.9[illegible]

EXHIBIT E-2

Joint Stock Traders

Balance Sheet
At June 30, 1964

Assets

Cash		56 17 -
Investments		475 [illegible] 55
Gruntal & Co - Account Receivable		75 33
Total Assets		476 58 160

Liabilities & Capital

Liabilities:		
Reynolds & Co - Account Payable	188 55 351	
Theorson, Hannill & Co "	51 49 366	44 004 717
Capital "		436 53 443
Total Liabilities & Capital		476 58 160

Income Statement
Six Months Ended June 30, 1964

Securities - Sales	183 17 605	
" Cost	161 44 418	21 95 187
Dividends		379 411
Interest Income		38 463
Total Income		461 30 61
Interest Expense	746 440	
Accounting	400 -	
Transfer Taxes	118 -	798 040
Net Income		181 50 421

Capital Accounts

	1-1-64	Income	Drawings	6-30-64
Grace Lyons	80 54 497	6 55 595	-	87 10 092
Elizabeth Seely	31 30 477	2 54 902	-	33 85 179
Howard W. La Morte	49 99 717	4 06 583	-	53 93 -
Richard P. " "	1 26 76 54	10 48 39	45 00 -	91 56 93
William F. " "	62 14 503	5 06 064	-	67 20 567
Willard I. " "	58 85 744	4 79 038	-	63 61 612
Totals	444 84 412	181 50 421	45 00 -	436 53 443

EXHIBIT F-1

Sanford Boulevard, Mt. Vernon, Venture

Reconciliation of Capital
At December 31, 1963

	TOTAL	William F. La Morte	Willard T. La Morte	Howard W. La Morte	Robert A. MacLeay
Capital, January 1, 1963	$39,495.90	$13,473.97	$13,473.98	$13,473.97	$13,473.98
Net (Loss) Income for Period from January 1, 1963 to December 31, 1963	($1,333.30)	($333.32)	($333.32)	($333.32)	($333.32)
Total					
Less: Drawings					
Capital, December 31, 1963	$38,162.60	$13,140.65	$13,140.66	$13,140.65	$13,140.64

EXHIBIT F-2

Sanford Boulevard Mt Vernon Venture

Balance Sheet
At June 30 1964

Assets

Cash - Chase Manhattan			18,096.62
" First National City			9,785.1
Loans Receivable			25,149.99
Investments			44,208.04
Accrued Interest Receivable			1,250.-
Peps Real Estate			
Land		338,770	
Building	316,341.17		
Less: Depreciation	149,653.12	166,688.05	
Rent Receivable		10,676.01	
Mortgage Expense Unamortized		3,709.94	14,946.70
Total Assets			948,964.31

Liabilities & Capital

Liabilities:			
Accounts Payable		700.-	
Due Prefer - Spingarn, Heine & Co.		30,630.87	
Note Payable		100,000.-	
Mortgage Payable		637,578.97	
Accrued Interest - Mortgage		6,375.79	
Real Estate Assessment Payable and Accrued Interest		1,485.76	777,771.39
Capital			156,449.92
Total Liabilities & Capital			948,964.31

Capital Accounts

	1-1-64	Income	6-30-64
William F. La Morte	24,940.65	16,100.08	39,060.73
Willard J. La Morte	24,940.65	16,100.08	39,060.73
Howard W. La Morte	24,940.65	16,100.08	39,060.73
Robert A. MacLeay	24,940.65	16,100.08	39,060.73
Totals	98,763.60	64,400.32	156,449.92

EXHIBIT G-1

Willard J. La Morte, Partnership

Reconciliation of Capital
At December 31, 1964

Partners	Init. %	Capital 7-1-64	Income	Capital 12-31-64
William F. La Morte	[illegible]	[illegible]	[illegible]	[illegible]
Willard T. La Morte	[illegible]	[illegible]	[illegible]	[illegible]
Howard W. La Morte	[illegible]	[illegible]	[illegible]	[illegible]
Richard P. La Morte	[illegible]	[illegible]	[illegible]	[illegible]
Grace Young	[illegible]	[illegible]	[illegible]	[illegible]
Elizabeth Seely	[illegible]	[illegible]	[illegible]	[illegible]
Robert A. MacLean, Nominee	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	100.0000	[illegible]	[illegible]	[illegible]
Appr.	[illegible]	[illegible]		

EXHIBIT G-2

Willard J. La Monte, Partnership
Reconciliation of Capital

Partners:	Profit %	Capital January 1, 1965	Additions or (Withdrawals)	Income	Capital December 31, 1965
William F. LaMonte	43.461	180 780 51	100 -	19 007 75	199 888 26
Willard J. LaMonte	34 039	262 385 62	00	27 597 71	289 983 33
Leonard W. La Monte	10 069	17 777 54	(17 500 -)	16 759 46	17 037 00
Richard P. LaMonte	1 235	9 525 21	00	1 000 98	10 526 19
Grace Lyons	1 153	9 061 27	00	952 40	10 013 67
Elizabeth Seely	4 673	35 213 27	00	3 700 33	38 913 60
Robert A. MacLeay, Nominee	15 588	119 183 66	00	12 543 38	131 727 04
Totals	100.0000	788 377 08	(17 500 -)	81 017 81	851 994 89

A-44

EXHIBIT G-3

	INITIALS	DATE
PREPARED BY		
APPROVED BY		

Willard J. La Mont, Partnership
Reconciliation of Capital
December 31, 1966

(1) Criteria:	(2)	(3) Profit %	(4) Capital January 1, 1965	(5) Net Additions or (Withdrawals)	(6) Income (Loss)	(7) Capital December 31, 1966	Line No.
Willard J. La Mont		37.9237	199888.96	2000.-	(64603.40)	137284.96	1
Willard J. La Mont		34.1133	89956.33	.00	(98785.54)	197171.79	2
Howard W. La Mont		19.5036	17087.-	(5500.-)	(5955.14)	11631.86	3
Richard P. La Mont		1.9406	10578.19	.00	(3368.42)	7209.77	4
Grace La Mont		1.1801	10013.47	.00	(3044.45)	6809.32	5
Elizabeth Seely		4.2864	38913.60	.00	(12467.20)	26446.40	6
Richard P. La Mont, Howard W. La Mont, Trustees		1.5745	13170.84	.00	(4581.86)	8588.98	7
Totals		100.0000	85194.89	(3500.-)	(97151.71)	57680.18	8

PREPARED BY		
APPROVED BY		

EXHIBIT G-4

Willard J La Morte, Partnership

Capital Accounts

	1-1-67	1967 Profit	Drawings	12-31-67	%
Wm. F. La Morte	137v486	40,594	8500 -	13v80080	13.061
W. J. La Morte	197,779	61,485	—	203v1v9	35,307
H. W. La Morte	11v531 86	31,979	10000 -	105v915	18,360
R. P. La Morte	71577	vvvvq	vq v7	73079	1.277
Grace Lyons	68093v	1,734	—	70v166	1.219
Elizabeth Seely	v64614o	8515	—	v7v655	4.738
K.A. Macleay, Nominee	895618	v79v85	—	9v3503	16.038
Totals	576980 18	174,430	185vqv7	57586v7	100.000

EXHIBIT H-1

Wm. H. Daly IV, Agent
7-1-63 to

1

Purchases Date	#	$	Sales Date	#	$
10 14 63	200	16895.00	5 21 64	200	20333.35
12 19	847	DIVIDEND	21	200	21332.31
5 19 65	500	5211.25	8 19	200	17632.4
10 27	200	1644.529	21	200	17877.98
	1747		9 3	200	18117.2
			4	200	20333.35
			10 2	100	10785.3
			2	100	10785.3
			16	200	22560.3
Brought Fwd	515		16	100	11156.5
			16	200	22312.7
Balance Forward	3699		27	200	20880.77
			8 19 65	200	16870.2
			20	500	42299.2
			23	200	17602.8
			9 17	100	8434.49
			21	100	8558.7
			23	100	8682.4
			24	100	8680.4
			28	100	8558.7
			29	100	8434.49
			11 2	100	8434.49
			3	100	8558.7
			4	100	8558.7
			11	100	8064.1
			12	100	8558.7
			23	100	9053.7
			12 13	100	7816.6
			13	100	7816.6
			14	100	7816.6
			15	200	15638.2
			16	100	8064.1
			16	100	7940.3
			20	100	8064.1
			20	100	7940.3
			21	200	15880.6
			21	200	15633.2
			21	100	7940.3
			29	100	7940.3
			29	100	7940.3
			31	100	7816.6
			Fwd	5908	

W. J. La M, Agent
1-1-63 to

#2

LINE NO	(1)	(2)	(3)	(4) Date	(5) Sales # 5900	(6) $	(7)	LINE NO
1				1 3 66	100	80641		1
2				3	100	79403		2
3				3	100	79403		3
4				4	200	170319		4
5				5	100	79403		5
6				6	200	176136		6
7				6	100	88068		7
8				7	100	85623		8
9				10	100	85623		9
10				11	200	170		10
11				14	100	85623		11
12				5 17	400	396539		12
13				17	100	101609		13
14				17	100	102847		14
15				17	100	100372		15
16				20	100	102847		16
17				21	100	106559		17
18				31	100	105322		18
19				31	100	104284		19
20				31	100	101609		20
21				31	100	100372		21
22				31	100	97134		22
23				31	100	97898		23
24				31	100	96760		24
25				31	100	95523		25
26				31	100	107797		26
27				6 1	200	223919		27
28				9	200	205495		28
29				9	100	113764		29
30				9	100	110223		30
31				9	100	116957		31
32				9	200	237869		32
33				9	100	117697		33
34				14	200	220345		34
35				14	100	112747		35
36				14	100	111509		36
37				15	200	220919		37
38				15	100	112747		38
39				16	300	338243		39
40				16	100	113984		40
41				16	100	114522		41
42				17	100	110272		42
43				17	100	112747		43
					11500			

A-48

	INITIALS	DATE
PREPARED BY		
APPROVED BY		

W. J. LaM, Agent #3
5-1-63 to

LINE	(1)	(2)	(3)	(4) Date	(5) Sales #	(6) $	(7)	LINE
					11600			
1				6 17 66	100	113984		1
2				17	100	111509		2
3				20	100	111509		3
4				22	100	109039		4
5				23	100	107797		5
6				23	100	109039		6
7				23	100	111509		7
8				24	100	110272		8
9				27	100	105322		9
10				27	100	106559		10
11				27	100	107797		11
12				7 29	1600	1294728		12
13				M- 30	700	410165		13
14					14700			14
15								15
16								16
17								17
18								18
19								19
20								20
21								21
22								22
23								23
24								24
25								25
26								26
27								27
28								28
29								29
30								30
31								31
32								32
33								33
34								34
35								35
36								36
37								37
38								38
39								39
40								40
41								41
42								42

EXHIBIT H-2

	INITIALS	DATE
PREPARED BY		
APPROVED BY		

Joint Stock Traders
7-1-63 — 6/30/64

Ira Haupt

	Purchases Date		#	#	Sales Date	#	#	
1	9-	3 63	100	90338				
2		3	400	361352				
3		4	500	445375				
4	10	2	500	432750				
5	11	7	100	84025				
6		12	100	84025				
7		12	100	82763				
8		12	100	82763				
9		19	460	DIVIDEND				
10			1360					

	INITIALS	DATE
PREPARED BY		
APPROVED BY		

Joint Stock Papers

3-1-63 — 6/30/64

Sheerson Hammill FCs

Purchases Date	#	$	Sales Date	#	$	
7-10-63	500	439061	5-31-64	500	5546.98	
11 14	400	3510.52				
14	500	1630 —				
19	500	4075 —				
19	200	1630 —				
21	100	865.50				
21	100	871.13				
22	100	865.50				
22	200	1730 —				
12-15	100	815 —				
23	50	440.56				
23	100	865.50				
18	450	Dividends				
	3050					

	INITIALS	DATE
PREPARED BY		
APPROVED BY		

Joint Stock Trading
7-1-63 6/30/64

Dental Co.

Purchases Date	Purchases #	Purchases $	Sales Date	Sales #	Sales $
			5 14 64	100	88162
			21	300	316140
			21	100	105378
				500	
DCU 1/63	1013				

	INITIALS	DATE
PREPARED BY		
APPROVED BY		

Joint Stock Trading
7-1-63 — 6/30/64

Reynolds & Co.

Purchases Date	#	$	Sales Date	#	$
5 26 64	100	30	5 26 64	300	33240
9-28-64	100	35000	26	300	33396
	101		26	300	33298
			27	200	22560
			27	100	11028
				1300	

	INITIALS	DATE
PREPARED BY		
APPROVED BY		

Sanford Boulevard Venture
7-1-63 6/30/64

Schweickart & Co.

Purchases Date	#	$	Sales Date	#	$
7 2 63	400	21085	10 29 63	5000	36500
3	300	229250			
9	100	815			
9	200	1630			
10	300	2445			
12	100	787.25			
12	500	4115375			
18	4000	29,97750			
24	300	1,105.76			
25	400	1,471.63			
26	1500	5,513.75			
29	400	1,471			
9-4	400	1,481.50			
9-6	1000				
BALOW	1000				

A-54

	INITIALS	DATE
PREPARED BY		
APPROVED BY		

Sanford Boulevard
7-1-63 — 6-30-64

Spingarn, Heine & Co.

LINE NO.	(1) Purchases Date	(2) Purchases #	(3) Purchases $	(4) Sales Date	(5) Sales #	(6) Sales $	(7)	LINE NO.
1				6 19 64	100	832 16		1
2				19	100	856 87		2
3					200			3
4								4
5								5
6								6
7								7
8								8
9								9
10								10
11								11
12								12
13								13
14								14
15								15
16								16
17								17
18								18
19								19
20								20
21								21
22								22
23								23
24								24
25								25
26								26
27								27
28								28
29								29
30								30
31								31
32								32
33								33
34								34

EXHIBIT H-4

Partnership

Date	Bought	Price	Sold	Price	Balance
May 31-1964	—	—	—	—	40437
					~~24625~~ ~~82571~~
6/4/64 7/1/64	13952	—	200	1689.03	65112 ~~82311~~
					78864
7/8/64	500	4075.00			
7/8/64	500	4075.00			
7/8/64	200	1630.00			
7/28/64	500	3822.50			80564
8/11/64	~~100~~	~~757.41~~	100	757.41	
8/13/64	~~300~~	~~2459.30~~	300	2459.30	
8/14/64	~~100~~		100	856.87	
8/14/64			200	1689.02	
8/19/64		1600	300	2644.46	
8/28/64			300	2644.86	
8/30/64			300	2644.86	78964
9/3/64			300	2830.39	
9/4/64			200	2004.65	
9/4/64			200	2033.35	
9/16/64			100	443.45	
9/24/64		1200	100	979.58	
9/24/64			200	1911.70	
9/29/64			100	936.12	77764
10/1/64			200	2008.65	
10/2/64			300	3235.64	
10/2/64			300	3235.61	
10/5/64			1000	10,094.59	
10/19/64			100	1004.32	
10/27/64		4100	900	10,374.75	
10/27/64			900	10,374.75	
10/29/64			200	2330.22	
10/30/64			200	2330.23	73664
11/16/64			1100	12,371.10	
11/17/64		1652	352	3832.18	
11/30/64			200	2157.06	72012
12/2/64			300	3309.85	
12/4/64			200	2181.81	
12/4/64		1400	100	1090.90	
12/9/64			300	3111.87	71112

Dec 31 1964 Inventory →

EX H-4

A-56

Date	Bought	Price	Sold	Price	Balance
12/31/64	—	—	—	—	71,112
1/6/65			200	2206.57	
1/7/65			200	2141.81	
1/26/65			200	2627.14	
1/28/65			100	1387.28	
1/28/65			100	1387.28	
1/29/65			200	2837.44	70112
Feb 65	0		0		
March 65	0		0		
April 65	0		0		
5/19/65	500	5274.40			70612
6/16/65	1	—			70613
7/1/65	100	789.75			
7/1/65	600	4725.88			
7/2/65	900	6931.02	3500		
7/6/65	400	3083.25			
7/6/65	1500	11088.80			74113
August 65	0	0	0	0	
9/3/65	500	4025.00	3000		
9/3/65	2500	20,375.00			77113
Oct 65	0	0	0	0	
11/5/65			200	1787.44	
11/18/65			100	906.37	
11/19/65		500	100	893.49	
11/22/65			100	918.74	76613
12/16/65			100	807.41	
12/17/65		300	200	1590.06	76313
	Dec 31, 1965				
Jan. 6, 1966			100	856.87	
1/6/66		400	100	856.87	
1/14/66			100	930.49 C	
1/18/66			100	832.48	75913
2/4/64			200	1916.24 C	
2/4/66	3	—			75716
3/20/66			100	499.75 C	
3/22/66			100	414.31 C	75316

Date	Bought	Price	Sold	Price	Balance
March 66					7.5516
4/1/66			100	992.10 C	
4/15			100	921.52 C	
4/20			400	3761.66 C	
4/20			600	5948.36 C	
4/21		3000	100	1052.40 C	
4/21			500	4934.79 C	
4/21			400	4107.79 C	
4/22			300	3014.10 C	
4/28/66			500	5061.93 C	72516
5/6/66			200	2064.64 C	
5/10/66			500	5388.72 C	
5/11/66			100	1104.32 C	
5/12/66	200	2085.22 C			
5/17/66			200	2170.31	
5/17/66			200	2145.06	
5/17/66			600	6753.35 C	
5/18/66			100	1054.22	
5/18/66			100	1041.87	
5/23/66	400	4011.66 C			71116
6/2/66			1000	11037.26	
6/9/66			500	5704.23	
6/9/66			800	9436.14	
6/10/66			200	2455.94	
6/10/66		700	100	1153.22	
6/10/66			100	1103.72	
6/24/66			100	1102.72	
6/24/66			100	1091.37	68216
7/13/66			400	4332.49 C	
7/29/66			1700	14892.00 C	66116
8/15/66			100	943.35	
8/18/66	200	1882.50			
8/26/66	200	1705.76			
8/26/66	600	5268.70			
8/29/66	600	4965.76			
8/31/66			200	1744.66 C	67416
9/1/66	400	3133.76			
9/2/66	800	5964.52			
9/6/66	800	14280.00			
9/7/66	100	776.63	400	3223.57 C	
9/8/66			300	2437.61 C	
9/12/66			300	2597.86 C	
9/12/66			300	2396.43	

	Bgt.	Price	Sold	Price	Balance
9/26/66			100	779.25 c	
			100	785.96 c	
			100	772.67 c	
			100	759.39 c	
			100	746.10 c	67116
10/3/66			100	719.52 c	
			100	706.24 c	66916
Nov. 66					
Dec 66		December 31, 1966			66916
January 67					
Feb. 2-67			1400	15788.89	
2/3/67			200	2354.45	
2/7/67			800	9465.38	
Feb. 8		6000	800	10135.48	
2/9/67			300	3741.53	
2/15/67			1200	15834.36	
2/16/67			800	11051.24	
2/27/67			300	3346.03	
2/28/67			200	2181.15	60916
3/1/67			300	3216.54	
3/9/67			800	9083.65	
3/10/67		1728	200	2403.95	
3/24/67			328	3328.23	
3/31/67			100	1140.09	59188
4/7/67			100	1177.22	
4/11/67			100	1115.34	58988

Location

100	shs.	Schweikert (Wm. F.)
46,388	shs.	L. J. Forget (Bahama) W.J.L.
12,500	shs.	Personal Loan to Farrell Vincent
58,988	shs.	

EXHIBIT I

To the Board of Directors of
Shattuck Denn Mining Corporation

Mr. Willard J. La Morte submitted to us records and original brokerage statements which he stated reflected all transactions in Shattuck Denn Mining Corporation Capital Stock for the period June 30, 1963 through July 31, 1967, in which he had, or might be held to have, directly or indirectly, a "beneficial" interest, as that term is used in the Securities Exchange Act of 1934, including Release 7824 issued thereunder.

From such records and statements, two lists were prepared, one showing all "purchases" and one showing all "sales" (as those terms are used in Section 16(b) of the Securities Exchange Act of 1934) of Shattuck Denn Mining Corporation Stock for the period under review. There were listed as to each transaction: the contract date (calculated from the closing dates shown on the statements by subtracting the known period for settlement of contracts, regular way), the number of shares, and the total purchase price or net proceeds. Transactions in a foreign currency were converted into U.S. Dollars as of the contract date. Appropriate adjustment was made for the stock dividend paid December 19, 1963 (ex dividend December 2, 1963). Shares of Shattuck Denn Mining Corporation Stock received for shares of The Fireproof Products Co., Inc., pursuant to the Agreement and Plan of Merger effective February 1, 1966 were treated as an acquisition on that date and valued at $8.75 a share, the mean market price of such shares on the effective date of the merger.

The entire holding of Shattuck Denn Mining Corporation Stock of any trust, partnership, joint venture, corporation, or other organization, in which Mr. La Morte had an interest, insofar as we are aware, was included on the lists and not merely Mr. La Morte's proportionate interest therein.

The lists included all of the transactions in Shattuck Denn Mining Corporation Stock shown on the Form 4 prepared by Mr. La Morte as of August 16, 1967, which we had previously checked against such records and statements.

Purchases and sales within six months as shown on the two lists (calculated as one day less than six months before and one day less than six months after each purchase or sale) were then matched for maximum profit, ignoring all losses, and the "profits" in such period calculated as $56,566.36, exclusive of interest.

The "matches" were then rearranged to effect the earliest possible closing date for each "match" and interest at 6% for the periods beginning with such closing dates and ending on August 16, 1967 determined to be an aggregate of $4,676.67.

Weiss, Berman & Sessler
Certified Public Accountants

New York, N. Y.
August 18, 1967

WILLARD J. LA MORTE

Transactions in Shattuck Denn Mining Corporation Capital Stock in which a "profit" might be held to have been realized pursuant to Sec. 16 (b) of the Securities Exchange Act of 1934. (Stock acquired pursuant to Merger Agreement dated September 14, 1965 attributed a cost of $5.75 a share).

July 1, 1963 - July 31, 1967

Contract Date	Number Shares	Net Proceeds		Cost		"Profit"
5/11/64	100		881.62		776.19*	$105.43
11/14/63	100					
5/18/64	200	2,132.31				
5/18/64	115	1,211.87				
			3,344.18		2,596.50	747.68
11/19/63	315*					
5/21/64	200		2,827.56			
12/2/63	100			815.00		
12/18/63	50			440.56		
12/18/63	100			865.50		
					2,121.06	706.50
5/21/64	1		11.31		10.00	
5/24/64	1					1.31
10/22/64	600	6,990.68				
10/22/64	100	1,140.39				
10/22/64	100	1,152.74				
10/22/64	200	2,305.53				
10/22/64	300	3,458.27				
			15,047.61			
7/3/64	700			5,705.00		
7/9/64	300			2,445.00		
7/23/64	300			2,293.50		
					10,443.50	4,604.11
10/26/64	200		2,330.22		1,529.00	
7/23/64	200					801.22
10/27/64	200		2,330.23		1,630.00	
7/3/64	200					700.23
10/22/64	200		2,280.76		2,210.76	
12/8/64	200					70.00
11/24/64	200	2,157.06				
11/30/64	300	3,309.85				
			5,466.91			
5/14/65	500				5,211.25	255.66

*Adjusted for 5% stock dividend paid 12/19/63 (ex dividend 12/2/63)

Contract Date	Number Shares	Net Proceeds		Cost		"Profit"
12/1/64	400		4,363.61			
5/[illegible]/65	400				4,219.52	144.09
12/31/64	200	2,206.57				
1/[illegible]/65	200	2,181.81				
1/21/65	200	2,627.14				
1/25/65	200	2,775.56				
1/25/65	100	1,424.91				
1/26/65	100	1,412.53				
6/30/65	500		12,628.52			
6/30/65	500			3,696.25		
				3,633.15		
					7,329.40	5,299.12
8/16/65	200		1,687.02			
6/28/65	200				1,579.50	107.52
8/17/65	500		4,229.92			
6/28/65	100			777.13		
6/29/65	400			3,108.52		
					3,895.65	344.27
8/18/65	200		1,662.28			
6/28/65	100			789.75		
6/30/65	100			789.75		
					1,579.50	82.78
9/[illegible]/65	100		843.49			
6/28/65	100				789.75	53.74
9/16/65	100		855.87			
6/29/65	100				764.50	91.37
9/20/65	100		868.24			
6/29/65	100				764.50	103.74
9/21/65	100		868.24			
6/29/65	100				764.50	103.74
9/23/65	100		855.87			
6/29/65	100				764.50	91.37

Contract Date	Number Shares	Net Proceeds		Cost		"Profit"
9/24/65	100		843.49			
6/28/65	100				789.75	53.74
10/27/65	100		843.49			
6/28/65	100				789.75	53.74
10/28/65	100		855.87			
6/30/65	100				764.50	91.37
10/29/65	100		855.87			
6/30/65	100				764.50	91.37
11/1/65	100	906.37				
11/1/65	100	881.62	1,787.99			
6/29/65	100			764.50		
6/30/65	100			751.88	1,516.38	271.61
11/8/65	100		855.87			
6/3065	100				764.50	91.37
11/15/65	100		906.37			
6/30/65	100				751.88	154.49
11/16/65	100		893.99			
6/30/65	100				751.88	142.11
11/17/65	100		918.74			
6/30/65	100				751.88	166.86
11/18/65	100		905.37			
6/30/65	100				751.88	153.49
12/30/65	200		1,703.19			
8/31/65	200				1,630.00	73.19
1/3/66	200	1,761.96				
1/3/66	100	880.62				
1/3/66	200	1,713.74	4,356.32			
8/31/65	500				4,075.00	281.32

Contract Date	Number Shares	Net Proceeds		Cost		"Profit"
1/4/66	100		856.23			
8/31/65	100				815.00	41.23
1/5/66	100		856.23			
8/31/65	100				815.00	41.23
1/6/66	200		1,761.96			
8/31/65	200				1,630.00	131.96
1/11/66	100		856.23			
8/31/65	100				815.00	41.23
1/12/66	100		865.73			
8/31/65	100				815.00	50.73
1/13/66	100		832.48			
8/31/65	100				815.00	17.48
2/2/66	200		1,781.74			
8/31/65	200				1,630.00	151.74
3/25/66	100		878.48			
2/1/66	100				875.00	3.48
4/15/66	600	5,524.54				
4/15/66	400	3,679.53				
			9,204.07			
2/1/66	1000				8,750.00	454.07
4/19/66	100	977.53				
4/19/66	500	4,583.72				
4/19/66	400	3,815.27				
			9,376.52			
10/22/65	200			1,529.00		
2/1/66	800			7,000.00		
					8,529.00	847.52
4/20/66	300		2,798.84			
2/1/66	300				2,625.00	173.84
4/26/66	500		4,702.94			
2/1/66	500				4,375.00	327.94

Contract Date	Number Shares	Net Proceeds		Cost	"Profit"
5/4/66	200		1,917.77		
2/1/66	200			1,750.00	167.77
5/6/66	200	2,050.96			
5/6/66	100	1,013.14			
5/6/66	100	1,000.80			
5/6/66	100	988.46			
5/6/66	100	976.14			
			6,029.50		
2/1/66	600			5,250.00	779.50
5/12/66	200	2,182.68			
5/12/66	100	1,103.72			
5/12/66	100	1,078.97			
5/12/66	100	1,028.47			
5/12/66	100	1,016.09			
5/12/66	100	1,003.72			
5/12/66	400	3,965.39			
			11,379.04		
2/1/66	1100			9,625.00	1,754.04
5/13/66	100	1,075.91			
5/13/66	100	1,063.55			
5/13/66	100	1,054.22			
5/13/66	100	1,051.20			
5/13/66	100	1,041.84			
5/13/66	100	1,038.84			
5/13/66	100	1,026.50			
5/13/66	100	1,014.15			
			8,366.21		
2/1/66	800			7,000.00	1,366.21
5/17/66	100		1,028.47		
2/1/66	100			875.00	153.47
5/25/66	100	1,077.97			
5/25/66	100	1,065.59			
5/25/66	100	1,053.22			
5/25/66	100	1,040.84			
5/25/66	100	1,016.09			
5/25/66	100	1,003.72			
5/25/66	100	991.34			
5/25/66	100	978.98			
5/25/66	100	967.60			
5/25/66	100	955.23			
			10,150.58		
2/1/66	1000			8,750.00	1,400.58
5/26/66	200		2,230.19		
2/1/66	200			1,750.00	480.19

Contract Date	Number Shares	Net Proceeds		Cost	"Profit"
5/27/66	1000		11,037.26		
2/1/66	1000			8,750.00	2,287.26
6/6/66	200	2,254.95			
6/6/66	500	5,704.23			
6/6/66	400	4,662.38			
6/6/66	200	2,405.45			
6/6/66	200	2,378.69			
6/6/66	100	1,202.72			
6/6/66	100	1,176.97			
6/6/66	100	1,165.59			
6/6/66	100	1,164.59			
6/6/66	100	1,152.22			
6/6/66	100	1,139.84			
			24,407.63		
2/1/66	2100			18,375.00	6,032.63
6/7/66	200		2,454.94		
2/1/66	200			1,750.00	704.94
6/9/66	200	2,205.45			
6/9/66	100	1,127.47			
6/9/66	100	1,115.09			
			4,448.01		
2/1/66	400			3,500.00	948.01
6/10/66	200	2,230.19			
6/10/66	100	1,127.47			
			3,357.66		
2/1/66	300			2,625.00	732.66
6/13/66	300	3,382.43			
6/13/66	100	1,103.72			
6/13/66	100	1,153.22			
6/13/66	100	1,152.22			
6/13/66	100	1,139.84			
			7,931.43		
2/1/66	700			6,125.00	1,806.43
6/14/66	100	1,139.84			
6/14/66	100	1,127.47			
6/14/66	100	1,115.09			
6/14/66	100	1,102.72			
			4,485.12		
2/1/66	400			3,500.00	985.12

Contract Date	Number Shares	Net Proceeds		Cost		"Profit"
6/15/66	100		1,115.09			
2/1/66	100				875.00	
						240.09
6/17/66	100		1,090.34			
2/1/66	100				875.00	
						215.34
6/20/66	100	1,115.09				
6/20/66	100	1,102.72				
6/20/66	100	1,090.34				
6/20/66	100	1,077.97				
			4,386.12			
2/1/66	400				3,500.00	
						886.12
6/21/66	100	1,102.72				
6/21/66	100	1,091.34				
			2,194.06			
2/1/66	200				1,750.00	
						444.06
6/22/66	100	1,077.97				
6/22/66	100	1,065.59				
6/22/66	100	1,053.22				
			3,196.78			
2/1/66	300				2,625.00	
						571.78
7/8/66	100	1,025.39				
7/8/66	100	1,013.05				
7/8/66	100	1,000.72				
7/8/66	100	988.37				
			4,027.53			
2/1/66	400				3,500.00	
						527.53
8/10/66	100		943.35			
5/18/66	100				918.63	
						24.72
2/3/67	800		10,135.48			
8/23/66	200			1,756.26		
8/23/66	100			890.75		
8/23/66	200			1,731.00		
8/23/66	200			1,705.76		
8/24/66	100			840.25		
					6,924.02	
						3,211.46

Contract Date	Number Shares	Net Proceeds	Cost		"Profit"
2/3/67	300	3,791.53			
8/15/66	200		1,882.50		
8/22/66	100		890.75		
				2,773.25	
					1,018.28
2/9/67	1200	15,834.36			
8/24/66	200		1,655.26		
8/24/66	200		1,630.00		
8/24/66	100		840.25		
8/29/66	200		1,579.50		
8/29/66	200		1,554.26		
8/30/66	200		1,529.00		
8/30/66	100		751.88		
				9,540.15	
					6,294.21
2/10/67	800	11,051.24			
8/30/66	200		1,478.50		
8/30/66	200		1,453.26		
8/30/66	100		751.88		
8/31/66	200		1,428.00		
8/31/66	100		726.63		
				5,838.27	
					5,212.37
				Total	$56,566.36

EXHIBIT I-1

To the Board of Directors of
Shattuck Denn Mining Corporation

Mr. Willard J. La Morte submitted to us records and original brokerage statements which he stated reflected all transactions in Shattuck Denn Mining Corporation Capital Stock for the period June 30, 1963 through July 31, 1967 in which he had, or might be held to have, directly or indirectly, a "beneficial" interest, as that term is used in the Securities Exchange Act of 1934, including Release 7824 issued thereunder.

From such records and statements, two lists were prepared, one showing all "purchases" and one showing all "sales" (as those terms are used in Section 16 (b) of the Securities Exchange Act of 1934) of Shattuck Denn Mining Corporation Stock for the period under review. There were listed as to each transaction: the contract date (calculated from the closing dates shown on the statements by subtracting the known period for settlement of contracts, regular way), the number of shares and the total purchase price or net proceeds. Transactions in a foreign currency were converted into U. S. Dollars as of the contract date. Appropriate adjustment was made for the stock dividend paid December 19, 1963 (ex dividend December 2, 1963). Shares of Shattuck Denn Mining Corporation Stock received for shares of The Fireproof Products Co., Inc., pursuant to the Agreement and Plan of Merger effective February 1, 1966 were treated as an acquisition on that date and valued at $10.75 a share, the value placed upon such shares in determining the exchange ratio under such merger agreement (being the market value of Shattuck Denn Mining Corporation Stock on December 3, 1964 when the Board of Directors of the Corporation approved the transaction in principal on the basis of the ratio based upon the market price of Shattuck Denn Mining Corporation Stock on such day as compared to the book value of The Fireproof Products Co. Inc. Stock as on December 31, 1964, and the value of the latter not having declined between such date and February 1, 1966).

The entire holding of Shattuck Denn Mining Corporation Stock of any trust, partnership, joint venture, corporation or other organization in which Mr. La Morte had an interest, insofar as we are aware, was included on the lists and not merely Mr. La Morte's proportionate interest therein.

The lists included all of the transactions in Shattuck Denn Mining Corporation Stock shown on the Form 4 prepared by Mr. La Morte as of August 16, 1967, which we had previously checked against such records and statements.

Purchases and sales within six months as shown on the two lists (calculated as one day less than six months before and one day less than six months after each purchase or sale) were then matched for maximum profit, ignoring all losses, and the "profits" in such period calculated as $37,036.04, exclusive of interest.

The "matches" were then rearranged to effect the earliest possible closing date for each "match" and interest at 6% for the periods begining with such closing dates and ending on August 16,1967 determined to be an aggregrate of $ 3,252.08

Weiss, Berman & Sessler
Certified Public Accountants

New York, N. Y.
August 18, 1967

3/2/66

SHATTUCK DENN MINING CORPORATION

Shares of Shattuck Denn Mining Corporation Capital Stock, $5 Par Value, issued on February 1, 1966 upon conversion of outstanding shares of The Fireproof Products Co., Inc. Capital Stock, No Par Value, pursuant to Agreement and Plan of Merger dated September 14, 1965 between Denn Holding, Inc., The Fireproof Products Co., Inc. and Shattuck Denn Mining Corporation

EXHIBIT J

Name and address of Shareholder		Social Security or Identifying Number	Shares of Fireproof held immediately prior to effective date of merger 1/31/66	Shares of Shattuck Denn into which converted (at ratio of 13.21 to 1) upon effective date of merger 2/1/66	
ank A. Acquaviva	1839 Mayflower Ave. Bronx, N.Y. 10461	101-24-0554	5	66.05	
seph A. Aiello	1545 Rhinelander Ave. Bronx, N.Y. 10461	067-22-7400	3	39.63	
izabeth Ann Bacon	18 Lawrence Place, Rockville Centre, N.Y.	128-24-2849	17	224.57	
gald J. Cameron	36 Benedict Place, Pelham, N.Y.	084-01-6757	1431	18,903.51	R
ymond J. Davies	162-07 Cryders Lane, Beechhurst, L.I. N.Y.	062-03-6884	551	7,278.71	R
seph Faucetta and Anna Faucetta Jt.Ten.	353 Central Ave. Brooklyn, N.Y. 11221	054-05-5753) 102-10-0673)	12	158.52	
eah Goldberg, Custodian Lawrence Goldberg UNIF GIFT MIN ACT NY	152-30 Melbourne Ave. Flushing 67, N.Y.	051-42-1440	66	871.86	
eah Goldberg, Custodian Beth Goldberg UNIF GIFT MIN ACT NY	152-30 Melbourne Ave. Flushing 67, N.Y.	126-38-3604	69	911.49	
llen Pieniek	105-20 66th Road, Forest Hills, L.I.	111-34-3609	46	607.66	
obert Geisler	36 Netto Lane, Plainview, L.I.	058-30-8095	46	607.66	
eah Goldberg	152-30 Melbourne Ave. Flushing 67, N.Y.	073-32-0968	46	607.66	
. Horace Hamada	64 Irving Place, New Rochelle, N.Y.	556-05-4777	7	92.47	
ane & Co.	c/o The Chase Manhattan Bank NA P.O. Box 1508, Church St. Station, New York, N.Y. 10008	13-6022144	798	10,541.58	R
elen D. Labahn and Ewald Labahn Jt.Ten.	161-11 59th Ave. Flushing, N.Y. 11365	063-07-4480) 058-10-1853)	131	1,730.51	

A-70

La Morte	888 Linden Avenue, Ridgefield, N.J.	145-05-0808	57	752.97	R
d W. La Morte, Custodian	Conver Steel & Wire Co. Inc.	101-38-5349	111	1,466.31	R
ren E. La Morte UNIF GIFT MIN ACT NY	600 East 132nd St. Bronx, N.Y. 10454				
ward W. La Morte, Custodian Stephen P. La Morte UNIF GIFT MIN ACT NY	" " " " " " "	077-36-7857	144	1,902.24	R
ward W. La Morte, Custodian Carolyn L. La Morte UNIF GIFT MIN ACT NY	" " " " " " "	101-38-5641	108	1,426.68	R
ward W. La Morte, Custodian Christopher H. La Morte UNIF GIFT MIN ACT NY	" " " " " " "	101-38-5350	187	2,470.27	R
ward W. La Morte, Custodian Susan A. La Morte UNIF GIFT MIN ACT NY	" " " " " " "	088-38-1580	157	2,073.97	R
ward W. La Morte	" " " " " " "	061-18-8323	1725	22,787.25	R
ne D. La Morte	41 Bush Avenue, Greenwich, Conn.	111-24-4034	355	4,689.55	R
ne D. La Morte, Custodian Andrew W. La Morte UNIF GIFT MIN ACT CONN	" " " " "	093-36-9555	25	330.25	R
ne D. La Morte, Custodian Aimee L. La Morte UNIF GIFT MIN ACT CONN	" " " " "	040-38-2646	70	924.70	R
ne D. La Morte, Custodian Robert L. La Morte UNIF GIFT MIN ACT CONN	" " " " "	093-36-9548	22	290.62	R
ne D. La Morte, Custodian Richard P. La Morte, Jr. UNIF GIFT MIN ACT CONN	" " " " "	093-36-9560	28	369.88	R
ne D. La Morte, Custodian Adrienne M. La Morte UNIF GIFT MIN ACT CONN	" " " " "	093-36-9550	41	541.61	R
chard P. La Morte	" " " " "	121-16-0960	1598	21,109.58	R
chard P. La Morte, Custodian Adrienne M. La Morte UNIF GIFT MIN ACT CONN	" " " " "	093-36-9550	63	832.23	R
chard P. La Morte, Custodian Aimee L. La Morte UNIF GIFT MIN ACT CONN	" " " " "	040-38-2646	60	792.60	R
hard P. La Morte, Custodian ndrew W. La Morte UNIF GIFT MIN ACT CONN	" " " " "	093-36-9555	94	1,241.74	R

Richard P. La Morte, Custodian Richard P. La Morte, Jr. UNIF GIFT MIN ACT CONN	41 Bush Avenue, Greenwich, Conn.		093-36-9560	129	1,704.09	R
Richard P. La Morte, Custodian Robert L. La Morte UNIF GIFT MIN ACT CONN	" " " " "		093-36-9548	158	2,087.18	R
Wm. F. La Morte, Richard P. LaMorte and Willard J. La Morte as Trustees u/a 12/1/54 f/b/o Robert L. La Morte	" " " "			14	184.94	R
Wm. F. La Morte, Richard P. La Morte and Willard J. La Morte as Trustees u/a 11/7/55 f/b/o Andrew W. La Morte	" " " "			78	1,030.38	R
Wm. F. La Morte, Richard P. La Morte and Willard J. La Morte as Trustees u/a 12/1/56 f/b/o Aimee L. La Morte	" " " "			40	528.40	R
Wm. F. La Morte, Richard P. La Morte and Willard J. La Morte as Trustees u/a 12/1/54 f/b/o Richard P. La Morte, Jr.	" " " "			57	752.97	R
Willard J. La Morte	15 Hillcrest Drive, Pelham Manor, N.Y.10803		13-6181477	39	515.19	R
Mignon S. La Morte	" " " " " "		120-28-6937	559	7,384.39	R
Willard J. La Morte	320 Park Avenue, New York, N.Y. 10022		057-16-0343	1446	19,101.66	R
Mignon T. Lawless	463 Pelham Manor Road, New Rochelle, N.Y.		108-34-2150	105	1,387.05	
Mignon S. La Morte, Custodian Thomas F. La Morte, JUNIF GIFT MIN ACT NY	15 Hillcrest Drive, Pelham Manor, N.Y.10803		109-36-8609	134	1,770.14	R
Mignon S. La Morte, Custodian William F. La Morte, II UNIF GIFT MIN ACT NY	" " " " " "		075-36-6902	117	1,545.57	R
Wm. F. La Morte	87 Grandview Blvd. Yonkers, N.Y. 10710		063-07-4484	103	1,360.63	R
Grace M. Lyons	121 Brookside Drive, Greenwich, Conn.		064-22-2800	7	92.47	
J. William Lyons, Custodian Karen Lyons UNIF GIFT MIN ACT NY	" " " " "		045-40-6625	11	145.31	
J. William Lyons, Custodian Maureen Lyons UNIF GIFT MIN ACT NY	" " " " "		045-40-6623	11	145.31	
J. William Lyons, Custodian Alison Lyons UNIF GIFT MIN ACT NY	" " " " "		045-40-4590	11	145.31	
J. William Lyons, Custodian Miss Grace M. Lyons UNIF GIFT MIN ACT NY	" " " " "		045-40-4588	11	145.31	

illiam Lyons, Custodian abeth A. Lyons UNIF GIFT MIN ACT NY	121 Brookside Drive, Greenwich, Conn.	045-40-4589	16	211.36	
illiam Lyons, Custodian tharine T. Lyons UNIF GIFT MIN ACT NY	" " " " "	045-40-6624	71	937.91	
as J. McCarthy	7523 5th Avenue, Brooklyn, N.Y. 11209	063-07-4486	12	158.52	
A. Neary & aire M. Neary Jt.Ten.	47-26 45th St. Woodside, L.I.,N.Y. 11377	128-01-9147 027-18-0535	63	832.23	
ley Olsen	12 Mulberry Drive, Huntington, L.I. N.Y.	039-03-8751	3	39.63	
el Schwartz	1390 Oneida Ave. North Bellmore, L.I. N.Y.	106-26-8080	1	13.21	
Sedlack and len Sedlack Jt.Ten.	153-09 77th Ave. Flushing, L.I. N.Y.11367	133-07-2234 125-12-8613	17	224.57	
hen Sedlack	332 West 263rd St. Bronx, N.Y. 10471	053-09-9598	254	3,355.34	R
n Louise Shrimpton	123 ~~North~~ Lee Ave. Rockville Centre, L.I.N.Y.	072-18-3170	20	264.20	
in B. Stone	172 St. Marks Ave. Freeport, L.I. N.Y.	464-07-3966	15	198.15	
ian M. Stone	224 East 48th St. New York, N.Y. 10017	062-01-6440	12	158.52	
ent R. Striano	2632 Windmill Dr. Yorktown Hgts. N.Y.	087-16-4196	115	1,519.15	R
		Totals	11,702	154,583.42	
		Less fractional share not issued		.42	
		Total additional shares of Shattuck Denn Capital Stock ($5 Par) issued		154,583	

Note: Shattuck Denn Mining Corporation has offered to acquire from the foregoing shareholders at $10.75 a share their fractional interests, aggregating 29.42 shares. Such 29 shares (ie 29.42 less .42 not issued) will, when acquired, be held as treasury stock.

EXHIBIT K

THE FIREPROOF PRODUCTS CO., INC.

BALANCE SHEET
JANUARY 28, 1966

ASSETS

CURRENT ASSETS:			
Cash on Hand and in Banks		$ 424,733.61	
Notes and Accounts Receivable	$2,606,041.24		
Less: Reserve for Bad Debts.	81,340.34	2,524,707.90	
Merchandise Inventory		1,108,223.87	
Prepaid Expenses		11,508.40	
TOTAL CURRENT ASSETS			$4,069,173.[illegible]
INVESTMENTS IN & ADVANCES TO AFFILIATED COMPANIES - NET			330,[illegible]
PROPERTY, PLANT AND EQUIPMENT:			
Land		$ 245,078.36	
Depreciable Assets	$ 291,107.09		
Less: Accumulated Depreciation	229,623.70	61,483.39	[illegible]
OTHER ASSETS:			
Cash Surrender Value of Life Insurance Policies, less loans thereon			[illegible]
TOTAL ASSETS			$4,[illegible]

LIABILITIES AND STOCKHOLDERS' EQUITY

CURRENT LIABILITIES:			
Accounts Payable	$ 665,839.45		
Bonds and Notes Payable, due within one year	1,567,644.19		
Accrued Interest and Taxes Payable	117,419.98		
TOTAL CURRENT LIABILITIES		$2,350,903.62	
LONG TERM DEBT:			
Bonds and Notes Payable not due within one year		736,319.60	
TOTAL LIABILITIES			$3,087,[illegible]
STOCKHOLDERS' EQUITY:			
Capital Stock: Authorized 25,200 shares Issued and Outstanding 11,702 shares		$ 690,534.62	
Retained Earnings		1,018,429.39	
TOTAL STOCKHOLDERS' EQUITY			1,[illegible]
TOTAL LIABILITIES AND STOCKHOLDERS' EQUITY			$4,[illegible]

AFFIDAVIT OF DONALD C. HAIN IN OPPOSITION TO MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- X

SHATTUCK DENN MINING CORPORATION,

Plaintiff,

67 Civ. 3222

-against-

WILLARD J. LaMORTE,

Defendant.

AFFIDAVIT

- X

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Donald C. Hain, being duly sworn, deposes and says:

1. I have acted as legal counsel to Shattuck Denn Mining Corporation ("Shattuck") since approximately 1950 and as part of my duties have made annual examinations of Form 4s filed with the American Stock Exchange with respect to changes of stockholdings by "insiders" of Shattuck.

2. On or about July 12, 1963 defendant Willard J. LaMorte ("LaMorte") filed a Form 4 for the month of June, 1963, showing all changes in his direct and indirect holdings from February 22, 1957 to June 30, 1963. On that occasion he was advised that he had a liability for short-swing profits to Shattuck, which he duly paid.

3. From July 12, 1963 to August, 1967, LaMorte filed several Form 4s showing changes in his direct or indirect holdings. However, none of these Form 4s reflected facts indicating short-swing profits or liability to Shattuck.

4. Then, in late April, 1967, the SEC commenced an investigation in trading in stock of Shattuck, as a result of which a complaint was filed by the SEC against LaMorte and

Shattuck, among others, seeking an injunction against the use of false press releases, against distribution of Shattuck's stock in violation of the Securities act of 1933 and against the filing of false Form 4s by LaMorte. This action resulted in the granting of a temporary injunction by Judge Cooper against LaMorte; and, eventually, both Shattuck and LaMorte entered into consent decrees. The SEC investigation also resulted, indirectly, in the filing of a class action for damages against Shattuck, LaMorte and others based upon alleged dissemination of false information regarding Shattuck and its affairs.

5. In the course of the SEC's activities with respect to Shattuck and LaMorte, there was first disclosed to anyone in Shattuck other than LaMorte the fact that LaMorte directly or indirectly had bought or sold Shattuck shares under such circumstances as to create liability to Shattuck for any profits thereon under the provisions of Section 16(b) of the Securities Exchange Act of 1934. LaMorte filed on or about August 16, 1967 a Form 4 for the month of July, 1967, "and changes since April 30, 1964 (Revised)". This Form 4 (attached hereto as Exhibit "A") was the first <u>detailed</u> information received by Shattuck as to LaMorte's trading.

6. LaMorte has argued in his motion papers on this motion that Shattuck had notice of the various trades, even though they were not disclosed on Form 4s, because it received copies of transfer sheets. Although it is true that Shattuck received transfer sheets, the fact is that LaMorte received them personally for examination and it was the function of no one else in Shattuck to make any examination. It is also

true to the best of my information and belief that all or substantially all of the shares traded were in street name, not in the name of the individuals or partnerships concerned, and that, therefore, even a close examination of the transfer sheets would not adduce the facts pertaining to the various trades by LaMorte or partnerships in which he was involved.

7. Upon receipt of a copy of LaMorte's Form 4 for July, 1967, Shattuck delivered the information to its accountants, who then computed the recoverable ¶16(b) profits pursuant to the instructions given by me as to the effect of the law. LaMorte was then represented by the firm of Sullivan, Donovan, Hanrahan, McGovern & Lane, who participated in behalf of LaMorte in discussions as to the extent of LaMorte's liability. When LaMorte at one point objected to paying the full profits made by the partnerships on their trading of Shattuck's stock as opposed to paying only his pro rata share, I stated that if the full amount were not paid a suit would be instituted against each of the partnerships. Thereupon LaMorte paid the full amount of the asserted liability, except that he would not agree to Shattuck's theory of valuation of shares of Shattuck's stock received by him as a shareholder of The Fireproof Products Co., Inc. ("Fireproof") upon the merger of Fireproof into a subsidiary of Shattuck on February 1, 1966. And, therefore, on August 23, 1967 Shattuck commenced the instant action against LaMorte for recovery of short-swing profits based upon Shattuck's valuation of the Fireproof shares given in exchange for Shattuck's shares on the merger.

8. LaMorte's answer counter-claims for money paid by mistake in valuing Fireproof's shares at $10.75 each in connection with the merger of Fireproof into a subsidiary of Shattuck. The issue in the action, therefore, so far has been limited to valuation of Fireproof's shares as of February 1, 1966, the date of the merger. LaMorte now seeks to amend his answer so as to set forth counter-claims based on additional theories of overpayment. Shattuck's accompanying Memorandum of Law opposes the filing of an amended answer. I wish to point out herein that Shattuck would be greatly prejudiced by permitting the answer to be amended so as to allege that LaMorte was liable only for short-swing profits in proportion to his share in the partnership. The basis for this prejudice is that had the counter-claim been promptly made upon institution of this suit, Shattuck would have been in a position to file suit against the partnerships on the theory that LaMorte having been a "deputy" of each of the partnerships in assuming his position as a director, each of the partnerships was itself a director. Such a suit against the partnerships may no longer be brought in view of the two year statute of limitations contained in Section 16(b).

9. On February 1, 1966, the date of the merger of Fireproof into a subsidiary of Shattuck, Shattuck's common stock on the American Stock Exchange sold at a low of $8-5/8 and a high of $8-7/8. Fireproof's stock has never been bought or sold on the open market nor, to the knowledge of deponent,

has it been quoted on the over-the-counter market.

10. At all times relevant to the complaint LaMorte was president, chief executive officer and a director of Shattuck.

11. On March 25, 1970 Judge Sugarman entered an order (attached hereto as Exhibit "B") in this action that all pre-trial proceedings herein be completed within 90 days from that date and that plaintiff file a note of issue within that time. No further pre-trial proceedings were undertaken and the note of issue was duly filed. If the amended answer is permitted, it will be necessary for plaintiff to initiate extensive pre-trial proceedings to its prejudice and in conflict with Judge Sugarman's order.

Donald C. Hain

Sworn to before me this
21 day of August, 1970.

NOTARY PUBLIC State of New York
No. 41-5642220 Queens County
Cert. filed in New York County
Term Expires March 30, 1971

A-80

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 4

STATEMENT OF CHANGES IN BENEFICIAL OWNERSHIP OF SECURITIES

Filed pursuant to Section 16(a) of the Securities Exchange Act of 1934, Section 17(a) of the Public Utility Holding Company Act of 1935, or Section 30(f) of the Investment Company Act of 1940.

SHATTUCK DENN MINING CORPORATION

(Name of listed company, holding company or investment company)

Willard S. La Morte

(Name of person whose ownership is reported)

Room 803, 440 Park Avenue South, New York, N. Y. 10016

(Business address of such person; street, city, zone, state)

Relationship of such person to company named above. (See instruction 6)

Director

Statement for Calendar Month of July, 19 67

and changes since April 30, 1964 (Revised)

CHANGES DURING MONTH AND MONTH-END OWNERSHIP (See instruction 6)

TITLE OF SECURITY (See instruction 7)	DATE OF TRANSACTION (See instruction 8)	AMOUNT BOUGHT or otherwise acquired (See instruction 8)	AMOUNT SOLD or otherwise disposed of (See instruction 8)	NATURE OF OWNERSHIP (See instruction 10)	AMOUNT OWNED beneficially at end of month (See instruction 9)
Capital Stock, $5 par				Direct	19,101
				Indirect	75,338 *

* Pursuant to Rule 16a - 3, the filing of this Form shall not be construed as an admission that I am, for the purpose of Section 16 of The Securities Exchange Act of 1934, the beneficial owner of all of such securities.

REMARKS: (See instruction 11) Attached hereto are schedules showing direct and indirect holdings on April 30, 1964, as previously reported, and all acquisitions and dispositions thereafter, as revised. On indirect holdings, proportional interest is indicated.

Willard S. La Morte
(Signature)

Date of statement August 16, 1967

Exhibit A

SHATTUCK DENN MINING CORPORATION

Capital Stock, $5 Par

Millard J. La Morte
(Direct Holdings)

Date	Shares Acquired	Shares Disposed of	Total Shares Held	Remarks
[illegible]			15,152	
[illegible]		200		
5/[illegible]/64		300		
6/30/64		15,952	0	Transferred to Millard J. La Morte Partnership
2/1/66	19,101		19,101	Received for shares of The Fireproof Products Co., Inc. pursuant to Agreement and Plan of Merger dated 3/14/65 and effective 2/1/66 between Shattuck Denn Mining Corporation, The Fireproof Products Co., Inc. and Denn Holding, Inc.

SHATTUCK DENN MINING CORPORATION

Capital Stock, $5 Par

Millard J. La Morte, Agent (a partnership)

Date	Shares Acquired	Shares Disposed of	Total Shares Held	Remarks
4/30/64			17,799	
5/21/64		400		
6/19/64		200		
8/21/64		200		
9/3/64		200		
9/4/64		200		
10/2/64		200		
10/16/64		500		
10/27/64		200		
5/19/65	500			
8/[illegible]/65		200		
8/20/65		500		
9/23/65		200		
9/17/65		100		
9/21/65		100		
9/23/65		100		
9/24/65		100		
9/28/65		100		
9/29/65		100		
10/27/65	200			
11/2/65		100		
11/3/65		100		
11/4/65		100		
11/11/65		100		
11/12/65		100		
11/23/65		100		
12/13/65		200		
12/14/65		100		
12/15/65		200		
12/16/65		200		
12/20/65		200		
12/21/65		500		
12/29/65		200		
12/31/65		100		
1/3/66		300		
1/4/66		200		
1/5/66		100		
1/6/66		300		
1/7/66		100		
1/10/66		100		
1/11/66		200		
1/14/66		100		

Willard J. La Morte, Agent (con't)

Date	Shares Acquired	Shares Disposed of	Total Shares Held	Remarks
2/1/66	515			Received for shares of The Fireproof Products Co., Inc., pursuant to Agreement and Plan of Merger, dated 9/24/65 and effective 2/1/66, between Shattuck Denn Mining Corporation, The Fireproof Products Co., Inc., and Denn Holding, Inc.
2/1/66	334		Received from	Mignon S. La Morte
	1,545		"	William F. La Morte, 2nd
	1,770		"	Thomas E. La Morte
	1,437		"	Mignon La Morte (Lawless), who received such shares in exchange for shares of The Fireproof Products Co., Inc., formerly held by them (see prior entry)
5/27/66		700		
5/30/66		100		
5/31/66		1000		
6/1/66		200		
6/2/66		800		
6/3/66		400		
6/6/66		300		
6/10/66		500		
6/17/66		400		
6/20/66		100		
6/22/66		100		
6/23/66		400		
6/24/66		300		
7/5/66		1600		
11/21/66		100		
11/22/66		100		
11/23/66		100		
11/25/66		100		
11/28/66		100		
11/29/66		100		
11/30/66		100	9,250	

Willard J. La Morte, Agent (con't)

Beneficial ownership of the above partnership

	1964	1965	1966
Willard J. La Morte	19.67%	14.62%	11.18%
Wife:			
Mignon S. La Morte	9.06	9.32	10.50
Children:			
Mignon La M. Lawless	.48	.84	.68
William F. La Morte II	12.99	11.56	19.07
Thomas E. La Morte	18.07	18.47	27.13
Debra La Morte	13.71	13.17	7.56
Lisa La Morte	18.28	19.37	14.48
Rita La Morte	4.32	6.80	5.19
Anne La Morte	3.42	5.85	4.21
	100.00%	100.00%	100.00%

CHATTUGA DENN MINING CORPORATION

Capital Stock, $5 Par

Willard J. La Morte Partnership

Date	Shares Acquired	Shares Disposed of	Total Shares Held
3/24/64	1		1
3/30/64	13,952		13,953
3/30/64	40,437		54,390 — Transferred from Willard J. La Morte
3/30/64	24,475		78,865 — Transferred from Joint Stock Traders
7/2/64	900		79,765 — Transferred from Sanford Boulevard Venture
7/23/64	300		80,065
7/28/64	500		80,565
8/ /64		100	80,465
8/ /64		300	80,165
8/ /64		300	79,865
8/ /64		500	79,365
8/ /64		300	79,065
8/ /64		300	78,765
8/ /64		300	78,465
8/13/64		400	78,065
8/ /64		100	77,965
8/ /64		300	77,665
9/ /64		100	77,565
9/ /64		200	77,365
9/ /64		600	76,765
9/ /64		1000	75,765
10/ /64		100	75,665
10/ /64		1800	73,865
10/ /64		200	73,665
11/ /64		300	73,365
11/ /64		1100	72,265
11/ /64		352	71,913
12/ /64		200	71,713
12/ /64		300	71,413
12/ /64		400	71,013
12/ /64		300	70,713
12/ /64	200		70,913
2/ /65		200	70,713
4/ /65		200	70,513
4/ /65		200	70,313
4/ /65		200	70,113
5/ /65		200	69,913
7/1/65	500		70,413
	700		71,113

Millard J. La Morte Partnership (con't)

Date	Shares Acquired	Shares Disposed of	Total Shares Held	Remarks
7/7/65	900			
7/8/65	1900			
9/2/65	3000			
9/28/65	3			
11/3/65		200		
11/18/65		100		
11/19/65		100		
11/22/65		100		
12/16/65		100		
12/17/65		200		
1/6/66		200		
1/11/66		100		
1/12/66		100		
2/4/66		200		
3/30/66		100		
3/31/66		100		
4/1/66		100		
4/13/66		100		
4/20/66		1000		
4/21/66		1000		
4/22/66		300		
4/28/66		500		
5/5/66		200		
5/11/66		600		
5/12/66	200			
5/17/66		1000		
5/18/66		200		
5/23/66	400			
6/2/66		1000		
6/9/66		1300		
6/10/66		200		
6/16/66		200		
6/24/66		200		
7/13/66		400		
7/29/66		1700		
8/15/66		100		
8/18/66	200			
8/26/66	800			
8/29/66	600			
8/31/66		200		
9/1/66	400			
9/2/66	800			
9/6/66	300			
9/7/66		400		
9/8/66		300		
9/12/66		600		
9/26/66		100		
9/27/66		100		
9/28/66		100		
9/29/66		100		
9/30/66		100		

Willard J. La Morte Partnership (con't)

Date	Shares Acquired	Shares Disposed of	Total Shares Held	Remarks
12/27/66		100		
12/28/66		100		
2/2/67		1400		
2/3/67		200		
2/7/67		800		
2/8/67		800		
2/9/67		300		
2/13/67		1200		
2/15/67		800		
2/27/67		300		
3/28/67		200		
3/31/67		300		
4/3/67		800		
4/10/67		200		
4/28/67		328		
4/31/67		100		
4/7/67		100		
4/11/67		100	59,088	

Willard J. La Morte's benefical interest in the above partnership:

Year	%
1964	33.2822
1965	34.0329
1966	34.1733

A-88

SHATTUCK DENN MINING CORPORATION

Capital Stock, $5 Par

Joint Stock Traders (a partnership)

Date	Shares Acquired	Shares Disposed of	Total Shares Held	Remarks
			42,637	
4/30/64		100		
5/14/64		900		
5/21/64		900		
5/26/64		300		
5/27/64		40,437	0	Transferred to Willard J. La Morte Partnership
6/30/64				

Willard J. La Morte beneficial interest in the above partnership:

26.393 %

SHATTUCK DENN MINING CORPORATION

Capital Stock, $5 Par

Sanford Boulevard Venture (a partnership)

Date	Shares Acquired	Shares Disposed of	Total Shares Held	Remarks
4/30/54			24,675	
6/29/54		200		
6/30/54		24,475	0	Transferred to Willard J. La Morte Partnership

Willard J. La Morte's benefidal interest in the above partnership:

25%

SHATTUCK DENN MINING CORPORATION

Capital Stock, $5 Par

Mignon S. La Morte
(wife of Willard J. La Morte)

Date	Shares Acquired	Shares Disposed of	Total Shares Held	Remarks
4/30/64			0	
2/1/66	7,384			Received for shares of the Fireproof Products Co., Inc. pursuant to Agreement and Plan of Merger dated 9/14/65 and effective 2/1/66 between Shattuck Denn Mining Corporation, The Fireproof Products Co., Inc. and Denn Holding, Inc.
2/1/66		384	7,000	Transferred to Willard J. La Morte Agent.

SHATTUCK DENN MINING CORPORATION

Capital Stock, $5 Par

Mignon S. La Morte
custodian for
William F. La Morte, 2nd
UNIF GIFT MIN ACT NY
(son of Willard J. La Morte)

Date	Shares Acquired	Shares Disposed of	Total Shares Held	Remarks
7/30/54			0	
2/1/66	1,545			Received for shares of The Fireproof Products Co., Inc., pursuant to Agreement and Plan of Merger dated 9/14/65 and effective 2/1/66 between Shattuck Denn Mining Corporation, The Fireproof Products Co., Inc., and Denn Holding, Inc.
2/1/66		1,545		Transferred to Willard J. La Morte Agent.

A-92

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

: ___ DAY ORDER
: REVIEW CALENDAR CALL
: DOCKET NO. ___

- x

The above-entitled action having come on for review on the ___ day of _____, 19__, before the Hon. _____, United States District Judge, and after hearing counsel, it is

ORDERED, that the parties shall complete all pre-trial proceedings contemplated by Part V (Rules 26 through 37) of the Federal Rules of Civil Procedure within ___ days from the date of this order, and it is further

ORDERED, that the PLAINTIFF shall file a note of issue for trial, or take other action to obtain a determination of the above-entitled action within the said period, and it is further

ORDERED, that if such note of issue is not filed or other action to obtain a determination is not taken within the said period, the above-entitled action may be dismissed without further notice, for want of prosecution, without costs, and it is further

ORDERED, that if any motion described in subparagraph (1) of subdivision (c) of General Rule 9 of this court is hereafter made in this case:

(1) Counsel for the moving party shall

(a) disclose the existence of this order and any extension thereof in the affidavit required by subdivision (f) of said General Rule 9;

(b) annex a copy of this order and any extension thereof to said affidavit; and

Exhibit B

(2) if the motion is not adjourned pursuant to subdivision (1) of said General Rule 9, it shall be heard even if the motion is consented to and the existence of this order and any extension thereof specifically called to the attention of the judge to whom the motion is presented,

and it is further

ORDERED, that if, after the filing of a note of issue pursuant hereto, any party files with the clerk his objections to placing the cause on the calendar pursuant to Calendar Rule 5(5), counsel for the party filing such objections shall

(a) disclose the existence of this order and any extension thereof in the objections permitted by Calendar Rule 5(b), and

(b) annex a copy of this order and any extension thereof to said objections.

Dated: New York, N. Y.
MAR 25 1970

Chief Judge

If this case is not placed on the trial calendar within the time stated above an ex parte order dismissing this action will be filed unless, prior to the expiration of said period, an application is granted further extending the time to comply. The application must be supported by an affidavit showing in detail the state of the case and the reason why additional time is needed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- X

SHATTUCK DENN MINING CORPORATION,

Plaintiff,

67 Civ. 3222

-against-

WILLARD J. LaMORTE,

Defendant.

AFFIDAVIT

- X

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Raymond J. Davies, being duly sworn, deposes and says:

1. I am the president of Shattuck Denn Mining Corporation ("Shattuck").

2. During February and March of this year, prior to the preparation of proxy material to be used in connection with Shattuck's annual meeting in May, defendant Willard J. LaMorte ("LaMorte") approached me and other members of the Board of Directors of Shattuck with threats that if Shattuck did not nominate a slate submitted by him for the Board of Directors he would institute a proxy battle for control. On these occasions he represented to me that he controlled for voting purposes all of the Shattuck stock held in his name, names of members of his family and in the names of the partnerships of which he was a member.

Raymond J. Davies

Sworn to before me this
20 day of August, 1970.

MARY C. CASEY
NOTARY PUBLIC State of New York
No. 41-5642220 Queens County
Cert. filed in New York County
Term Expires March 30, 1972

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- X

SHATTUCK DENN MINING CORPORATION,

Plaintiff,

67 Civ. 3222

-against-

WILLARD J. LaMORTE,

Defendant.

AFFIDAVIT

- X

STATE OF FLORIDA)
) ss.:
COUNTY OF SARASOTA)

Dugald J. Cameron, being duly sworn, deposes and says: I have been a partner with defendant Willard J. LaMorte ("LaMorte") in the "Willard J. LaMorte, Agent" partnership. LaMorte had full trading authority and full authority to act for the partnership in all respects, without consultation or approval of other partners. In no instance did I have knowledge of any trading in Shattuck's stock and I would have disapproved of any such trading.

Dugald J. Cameron

Sworn to before me this
18 day of August, 1970.

Adele Eppen
Notary Public

Notary Public, State of Florida at Large
My Commission Expires Dec. 31, 1973
Bonded by Transamerica Insurance Co.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

SHATTUCK DENN MINING CORPORATION,

Plaintiff, 67 Civ. 3222

-against-

WILLARD J. LaMORTE,

Defendant.

- X

PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE EXISTS A GENUINE ISSUE TO BE TRIED

On the Present Pleadings:

1. Plaintiff denies Item "13" of Movant's Statement and contends that the per share cost of Shattuck's stock to LaMorte as a result of the merger of Fireproof into a subsidiary of Shattuck on February 1, 1966 was the value of the Fireproof stock given up and that this value, rather than being the equivalent of $13.05 per Shattuck share, was $8.625 at most.

2. Plaintiff denies Item "25" of Movant's Statement if such item implies that defendant's present answer is a counter-claim based upon erroneous payment other than as a result of mistakenly fixing the value of Fireproof's shares.

If the Amended Answer is Permitted:

3. There is an issue as to whether LaMorte was the "beneficial" owner of the shares of Shattuck's stock held by the various partnerships of which he was a member.

4. Plaintiff denies that its accountants made any representations as stated in Item "15" and "20" of Movant's

Statement to the effect that such accountants had "accurately" calculated profits recoverable under §16(b).

5. There is an issue as to whether defendant made any payments to plaintiff under any mistake whatever.

REPLY AFFIDAVIT OF WILLARD J. LA MORTE IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

SHATTUCK DENN MINING CORPORATION, : 67 Civ. 3222

Plaintiff, :

- against - : REPLY AFFIDAVIT

WILLARD J. La MORTE, :

Defendant. :

----------X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

WILLARD J. La MORTE, being duly sworn, deposes and says:

I make this Affidavit in reply to the plaintiff's papers in opposition to my motion to amend the Answer and summary judgment. From July 12, 1963, to August, 1967, I filed with the Securities and Exchange Commission Form 4's reflecting my individual holdings and changes thereto in plaintiff's stock. (See movant's reply memorandum, Point III.) At the suggestion of Mr. Hain, in August, 1967, I filed a revised Form 4 which included, in addition to my holdings, the holdings of partnerships in which I was a member. In conformity with the rules of the Securities and Exchange Commission, I stated that the filing shall not be construed as an admission that I am for the purpose of Section 16 the beneficial owner of all of such securities.

At all times the corporation was fully apprised of my

holdings in its securities and any changes relating thereto. This information was contained in my Form 4's and it was set out upon the stock transfer sheets of the corporation. These documents were fully available to all responsible individuals of the corporation and were kept for their inspection in the company files. The implication of Mr. Hain (Hain aff., paragraph 6) that I was the only person who received and examined the transfer sheets of the company is wholly erroneous.

Mr. Hain refers to the law firm of Sullivan, Donovan, Hanrahan, McGovern & Lane and implies that they represented me in discussions as to my "liability" for short swing profits prior to the institution of this lawsuit. This is an inaccuracy and should not be inferred from Mr. Hain's statement. In fact, that firm represented me before the Securities and Exchange Commission while Mr. Hain represented the corporation. Upon the question of short swing profits, Mr. Hain was the sole advocate advising both the corporation and myself. Based upon that advice, I made available to the plaintiff's accountants all of the documents relating to the trades in plaintiff's securities by myself and the partnerships in which I was a member. So too, based upon that advice and upon the calculations made by the plaintiff's accountants, I made payment of the funds, a major portion of which are the subject matter of my counterclaim.

Though it is, I am informed, immaterial to the issue presented here, I must state for the record that I did not make payment to the plaintiff based upon the alleged extortion set forth by Mr. Hain in his Affidavit in Paragraph 7. Though perhaps it would enhance my legal position to state that payment was made under the threats there stated, such was emphatically not the case. My payment was based solely upon representations

of the plaintiff that the sums calculated to be profits were proper and then owing by me.

At no time did Mr. Hain suggest that the partnerships were liable for short swing profits. At no time did Mr. Hain threaten to sue these partnerships. At no time did I hinder Mr. Hain in any way from commencing a suit against the partnerships. If the plaintiff had legal justification to commence litigation against any of the partnerships, there was no impediment placed in its way from so doing. I am informed by my attorneys, however, that such a claim would have been subject to the statute of limitations as is the claim here, so that any claim against the partnerships would have to demonstrate that the action was commenced within two years from the date profits were realized. Thus amendment of my Answer is irrelevant to the claimed prejudice of the plaintiff. I could not be held responsible for its decision not to join the partnerships in this litigation or to start an independent action against them.

At no time did I receive more than my pro rata share of the profits obtained by the various partnerships in the purchase and sale or sale and purchase of the plaintiff's securities. These proportionate shares are documented by the exhibits to the moving papers and corroborated by plaintiff's Exhibit A.

In an endeavor to foist control of these partnerships on myself, plaintiff attaches the affidavits of Raymond J. Davies and Dugald J. Cameron.

The affidavit of Mr. Davies has not the slightest relation to the period of time relevant to this litigation, but speaks of an alleged conversation taking place this year. The statements relating to control of Shattuck stock therein contained

are inaccurate and Mr. Davies has since the execution of that affidavit admitted to me their inaccuracy. I never stated that I controlled such stock for any purpose, much less voting purposes. Indeed, I always stated that I did not know how these shares would be voted.

Mr. Cameron's affidavit is indefensible. Mr. Cameron was never a partner in the "Willard J. La Morte, Agent" partnership. This is borne out by Exhibit D_1-D_3 in the moving papers hereto and corroborated by plaintiff's Exhibit A.

At no time was I ever deputed by any of those partnerships to act in their interest on the Board of Directors of the plaintiff. Nor does plaintiff show any facts demonstrating such an outrageous contention. If this was not the case, there surely would be a plethora of evidence in the files of the corporation indicating otherwise.

The papers in opposition to my motion are a sham. The only issues present are legal ones which this Court is eminently qualified to answer on this motion.

WHEREFORE it is respectfully requested that this motion be granted in all respects together with such other and further relief as the Court may deem just.

Sworn to before me this
24 day of September, 1970.

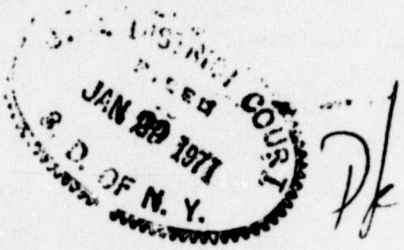
WYNNE B. STERN
Notary Public, State of New York
No. 60-[illegible]
Qualified in [illegible]
Commission Expires [illegible]

A-102

MEMORANDUM DECISION OF WYATT, J., DENYING MOTION

SHATTUCK DENN MINING CORPORATION,
Plaintiff,
-v-
WILLARD J. LA MORTE,
Defendant.

67 Civ. 3222



This is a motion for leave to serve an amended answer (Fed. R. Civ. P. 15(a)), for summary judgment in favor of defendant dismissing the complaint (Fed. R. Civ. P. 56), and for summary judgment in favor of defendant "for the relief demanded in defendant's counterclaim". Presumably the counterclaim to which reference is made is that contained in the proposed amended answer; a memorandum of law for defendant states that the motion for summary judgment is made "Upon such leave [to serve an amended answer] being granted (or even if amendment is deemed unnecessary)".

The action was commenced on August 23, 1967 and is for "short swing" profits under Section 16(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78a and following; "the Act"; section 16(b) is 15 U.S.C. § 78p(b)). It is averred that the relevant purchases and sales were made between June 30, 1963 and July 31, 1967; that defendant had paid what he computed was due to plaintiff; but that plaintiff believed a further sum of $20,151.52 was due. It appears that at all relevant times defendant was president and chief executive officer and a director of plaintiff.

Defendant served an answer with a counterclaim on October 16, 1967. The counterclaim avers that defendant had paid $40,289.62 to plaintiff but that this was erroneously calculated because the value was understated of certain shares of plaintiff (Shattuck) acquired by defendant as a result of a merger of Shattuck and The Fireproof Products Co., Inc. (Fireproof). The counterclaim prays that the Court determine the amount of overpayment and give judgment therefor against Shattuck "for the amount to be determined by the Court".

On October 20, 1967, Shattuck served a reply to the counterclaim.

By order filed March 25, 1970, Chief Judge Sugarman directed that pretrial proceedings be completed by both parties within 90 days and that within the same period a note of issue be filed by plaintiff.

On April 8, 1970, a substitution of counsel for defendant was filed.

~~On June 22, 1970~~ June 22, 1970, plaintiff filed a note of issue. No jury has been demanded.

The present motion was served by defendant on July 9, 1970 and was argued on September 29, 1970.

The Proposed Amendment

The proposed amended answer radically changes the pleadings.

The present answer admits the averments of the complaint except as to paragraph 10. The issue tendered by the defenses and counterclaim is the proper valuation of shares of Shattuck received by defendant when Shattuck and Fireproof were merged.

The proposed amendment would deny paragraphs 1, 5, 6, 7 and 11 of the complaint and partly deny paragraphs 4 and 8.

The proposed amendment would add to the counterclaim three new theories of error in the computation of short swing profits already paid by defendant. These are (1) that he paid profits on which the statute of limitations was a bar, (2) that he paid all the profits made by four family partnerships rather than his distributive share, and (3) that he paid profits on transactions matched within more than six months.

The proposed amendment would add new issues of fact and law at a time when all discovery has been completed and the action is on the trial calendar. The proposed amended answer was tendered almost three years after the answer was served. There is a dispute whether defendant was represented by counsel when he made a payment of profits to plaintiff. However this may be, it is clear that when the answer was filed he was represented by competent counsel, especially familiar with the facts because they had represented defendant during a background investigation by the Securities and Exchange Commission.

The introduction of the four family partnerships greatly complicates the issues of fact. In three of these partnerships, two persons outside the family appear for minority interests. In all other respects, these partnerships seem merely an extension of defendant himself. It also appears that Shattuck could have sued all the other partners, had this point been raised when the answer was served. They now have the defense of the statute of limitations and plaintiff would be prejudiced by the amendment.

Under the circumstances, the proposed amendment should not be allowed; it is untimely.

The Motion for Summary Judgment

Denial of the motion for leave to amend requires denial of the motion for summary judgment also, based as it is on the proposed amended answer.

Treating the motion for summary judgment as based on the answer, it ought also to be denied because the value of the Shattuck shares received on the merger presents an issue of fact which ought not to be decided on affidavits. Moreover, motions for summary judgment ought not to be encouraged after a case has been placed on the trial calendar.

The motion is in all respec denied.

SO ORDERED.

Dated: January 29, 1971

Inzer B. Wyatt

INZER B. WYATT
United States District Judge

PRE-TRIAL ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

SHATTUCK DENN MINING CORPORATION,
Plaintiff,

67 Civ. 3222

-against-

Cal. No. 504(4)

WILLARD J. LaMORTE,
Defendant.

----------X

The parties to this action or their attorneys having appeared before the court at a pre-trial conference on September 22, 1971, pursuant to Rule of Civil Procedure 16, the following action was taken:

(i) The pleadings were agreed to be deemed amended in accordance with the framing of the issues in this action in paragraph viii of the pre-trial order.

(ii) The parties agreed that the trial of this action shall be based upon the pleadings as described above and that no issues raised by the pleadings are abandoned.

(iii) The parties stipulated the following facts:

During the period June 30, 1963, through July 31, 1967, the defendant, Willard J. LaMorte, was an officer/director of Shattuck Denn Mining Corporation (''Plaintiff''), whose common shares were then trading on the American Stock Exchange.

During the aforementioned period of time, the defendant maintained a minority position in four partnerships. These partnerships made purchases and sales on the said Exchange of the plaintiff's common shares as reflected in P x 2, 3 and 13.

On February 1, 1966, and as a result of a merger of The Fireproof Products Co. Inc. (''Fireproof'') into a subsidiary of the plaintiff, the defendant, in his individual capacity received for his shares of Fireproof stock, unregistered shares of plaintiff's stock. The shares were exchanged based upon a fixed ratio of 13.21 shares of plaintiff's stock for each share of Fireproof stock. Fireproof was a closed corporation whose shares were not traded on any national exchange or in the ''over-the-counter'' market. The exchange ratio was premised upon a market value of $10.75 per share of Shattuck stock (as at December 3, 1964) and a book value of Fireproof stock as at December 31, 1964 ($142.00 per share). Upon the effective date of the merger, the mean value of plaintiff's stock had fallen to $8.75 per share ($2.00 below its mean market value as used to establish the exchange ratio). The book

value of Fireproof as of the effective date of the merger was $1,708,964.01, or $146.04 per share-an increase of $4.19 per share over its per share book value as used to obtain the exchange ratio, which amounts to $11.05 per share of Shattuck Denn received.

At the request of the plaintiff, the defendant made available to the plaintiff's accountants and attorney all brokerage statements and confirmations relating to trades of plaintiff's stock, including those of the partnerships. From this documentation, plaintiff's accountants matched purchases and sales as reflected in P x 2 and 3. The accountants chose, as the purchase price of the plaintiff's shares acquired on the exchange of the Fireproof shares, alternate sums of $8.75 per share and $10.75 per share.

Based upon plaintiff's calculations using a purchase price of $10.75 per share cost of the exchanged shares, payment was made to the plaintiff of alleged ''short-swing profits''.

The fair market value of shares of plaintiff on February 1, 1966, was not $10.75.

(iv) The parties agreed that the following documents, which were marked for identification, may be received in evidence:

P-1 Proxy material of Shattuck dated November 5, 1965, with respect to the proposed merger of Fireproof and Shattuck's subsidiary.

P-2 Letter dated August 18, 1967, to the board of directors of Shattuck from Weiss, Berman & Sessler, with attachments, computing short-swing profits of defendant on the assumption that Fireproof's shares had a value equivalent to $10.75 per Shattuck share received in exchange therefor.

P-3 Letter dated August 18, 1967, to the board of directors of Shattuck from Weiss, Berman & Sessler, with attachments, computing short-swing profits of defendant on the assumption that Fireproof's shares had a value equivalent to $8.75 per Shattuck share received in exchange therefor.

P-4 Form 4 dated July 12, 1963, filed by the defendant with the SEC.

P-5 Form 4 dated August 2, 1963, filed by the defendant with the SEC.

P-6 Form 4 dated September 9, 1963, filed by the defendant with the SEC.

P-7 Form 4 dated October 8, 1963, filed by the defendant with the SEC.

P-8 Form 4 dated November 7, 1963, filed by the defendant with the SEC.

P-9 Form 4 dated February 12, 1964, filed by the defendant with the SEC.

P-10 Form 4 dated June 10, 1964, filed by the defendant with the SEC.

P-11 Form 4 dated March 9, 1966, filed by the defendant with the SEC.

P-12 Form 4 dated May 25, 1966, filed by the defendant with the SEC.

P-13 Form 4 dated August 16, 1967, filed by the defendant with the SEC.

P-14 Balance Sheet of Fireproof as of December 31, 1965, and related Statements of Income and Retained Earnings for the year then ended, as certified by Kuttner, Weiss & Berman by certificate dated March 24, 1966.

D-A Memorandum of Shattuck Denn Mining Corporation dated March 2, 1966, listing shareholders on the exchange of Shattuck stock for Fireproof stock.

D-B January 28, 1966, Balance Sheet The Fireproof Products Co. Inc.

D-C List of trades of Shattuck stock by Willard J. LaMorte, Agent.

D-D List of trades of Shattuck stock by Joint Stock Traders.

D-E List of trades of Shattuck stock by Sanford Boulevard, Mt. Vernon, Venture.

D-F List of trades of Shattuck stock by Willard J. LaMorte Partnership.

D-G Fireproof balance sheet as of 1-28-66.

(v) The parties agreed to limit the number of expert witnesses to one for each party. The parties agree that the witnesses whom each will call are those listed in the memo previously filed.

(vi) The parties agreed that all of the claims for damages or for other relief in this action, as of the date of this conference, are as stated in the pleadings as described above, but cannot be mathematically computed at this time and are subject to change if at trial a motion to amend the complaint to conform to the evidence is granted.

(vii) Plaintiff at this time expects to require three trial days. Defendant at this time expects to require three trial days. The issues to be tried are formulated by the court as follows:

I. What was the fair value of Fireproof shares on February 1, 1966?

II. Is defendant liable for the full profits of the partnerships with respect to the transactions in question?

_____
Date

_____
U.S.D.J.

Consented to:

_____
Attorneys for Plaintiff

_____
Attorneys for Defendant

TRANSCRIPT OF HEARING HELD MARCH 21, 22, 23, 1973

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

SHATTUCK DENN MINING CORP., :

Plaintiff, :

vs. : 67 Civ. 3222

WILLARD S. LA MORTE, :

Defendant. :

----------x

Before:

HON. ROBERT L. CARTER,

District Judge

New York, N.Y.
March 21, 1973
1:10 p.m.

APPEARANCES

BURNS, VAN KIRK, GREEN & KAFER, ESQS.,
Attorneys for plaintiff,
BY: ALAN PALWICK, ESQ., of Counsel

FELDSHUH & FRANK, ESQS.,
Attorneys for defendant,
By: SIDNEY FELDSHUH, ESQ. and
DONALD DERFNER, ESQ., of Counsel

THE CLERK: Shattuck Denn Mining Corp. versus Willard S. La Morte.

MR. FELDSHUH: Defendant is ready, your Honor.

MR. PALWICK: Your Honor, I have written a letter to the Court previously stating my problems in bringing in witnesses. I have one to bring in from Minnesota. As of yesterday he went to North Carolina on a speaking engagement because we had released him. He can make it up here by 9:00 o'clock tonight but it is greatly inconvenient for him. We have another witness from Florida and he has made other plans because of the telephone conference yesterday, and if this could possibly be adjourned until Monday in the interest of justice and for the convenience of witnesses and I think in the interest of a more orderly presentation of the case, it would be greatly appreciated.

THE COURT: I can't adjourn it until Monday. My trial term ends Friday. The case has to go. I am sorry I am not in a position to honor your request, but I would never get anything tried.

MR. PALWICK: May I request a five-minute break so we can call these witnesses and tell them exactly what the picture is?

THE COURT: Yes. Five minutes?

MR. PALWICK: Long enough to make two telephone

calls; five or ten minutes.

THE COURT: We will adjourn for that.

(Recess.)

MR. FELDSHUH: Your Honor, may I just have a moment, please? My name is Sidney Feldshuh of the firm of Feldshuh & Frank, and Mr. Derfner and I represent the defendant La Morte.

Your Honor, prior to the commencement of this trial, I believe that it is important for us to tender to the Court a motion with regard to the state of the pleadings. In that connection, your Honor, some time ago on behalf of the defendant La Morte we moved in this court for permission to amend our answer to set forth certain affirmative defenses, one of which was that the complaint does not allege a state of facts upon which relief can be granted.

In due course --

THE COURT: When was that motion made?

MR. FELDSHUH: I am sorry, sir?

THE COURT: When was that motion made, Mr. Feldshuh?

MR. FELDSHUH: On the 21st day of July, 1970, and it was heard by Judge Wyatt.

THE COURT: All right.

MR. FELDSHUH: In due course, Judge Wyatt rendered a decision denying leave to amend. However, with regard to

our situation, your Honor, we are substituted counsel for the original counsel for the defendant La Morte, and after we came into the case we determined that the pleadings as then tendered by the former counsel did not in the circumstances assert all of the rights as to this defendant. And this becomes even more emphatic today because I have just been served with a set of marked pleadings wherein it becomes apparent that former counsel, resting upon the sense that in the Federal Court there need not be formal pleadings as we do have in the State Court, but the sense of the defendant's posture can be gleaned from the nature of his answer.

This set of marked pleadings which have now been tendered to me has the defendant admitting so many allegations of this complaint even to the extent of admitting bad faith and even to the extent of admitting that the defendant here is alleged to have effected the trades which form the gravamen of this litigation.

THE COURT: How long have you been counsel in the case?

MR. FELDSHUH: Your Honor, may I also say I have a hearing impediment and at the outset I want to apologize to the Court if I fail to hear you, sir.

THE COURT: No apology is necessary.

MR. FELDSHUH: Thank you, your Honor.

THE COURT: I have a habit of talking too softly so I will try to improve on that.

MR. FELDSHUH: I would appreciate it.

THE COURT: When did your firm take over the defense of this action?

MR. FELDSHUH: On or about July, 1970, your Honor.

THE COURT: What has been done by you since the denial of the leave to amend your answer which I understand was denied sometime in July of 1970?

MR. FELDSHUH: Judge Wyatt held it for several months before he came down with the decision.

MR. PALWICK: The date of the opinion is January 29, 1971, your Honor. I have a copy of it here, if your Honor would like to see it.

THE COURT: The case has been before me since I came to the court in October. I have had a pre-trial conference, I believe, on this matter.

MR. FELDSHUH: Yes.

THE COURT: I set it down for hearing. I indicated that it would be set down for trial. I am not aware that at that time any allegations such as you are making now were made. It seems to me that if I am correct in that, then I will have some -- my inclination would be to look with sympathy on your position, but if you have been counsel since

July, I am a new judge, if you are now for the first time on the eve of trial or during the trial making allegations of this sort, I think they come too late.

MR. FELDSHUH: My point, sir, is this: In connection with this motion for leave to amend, as your Honor knows, that is an interlocutory order and is not appealable to the Court of Appeals. However, it is preserved to the end of the trial, and in the event we should elect at that time to take an appeal we would be bringing up Judge Wyatt's decision and his ruling.

However, in the context of the present litigation before your Honor today I am going to address myself to have the defendant's answer amended at least, sir, to deny the allegations now set forth in the marked pleadings, a copy of which I just got ten minutes ago, wherein the word "admit" appears with regard to an Allegation 6, which is that the defendant traded the stock, and we wish to assert in that place, your Honor, that the defendant La Morte specifically denies that.

THE COURT: The problem with that is the plaintiff is giving us marked pleadings. He is merely marking the pleadings based upon the answer which is before the Court.

This allegation you are making now in regard to the denial, was this matter before Judge Wyatt?

MR. FELDSHUH: Not since, your Honor, at all. We submitted to Judge Wyatt our proposed amended answer and that was denied on the basis that, as Judge Wyatt's decision indicates, there might be prejudice to the plaintiff in bringing actions against other parties. So be it. We are now in this court and all that I am asking for today, your Honor, is that insofar as there is an allegation charging bad faith on the part of this defendant, to that extent it is certainly denied; and in charging that this defendant traded, to that extent it is denied.

THE COURT: Let me hear from Mr. Palwick.

MR. PALWICK: This statement took us by surprise. I hand up a set of marked pleadings. As you have observed, we haven't created any denials in making up the pleadings. We have taken the pleadings and copied the status of the answer.

Counsel came into this case on April 8, 1970 and made a motion to amend his answer. That motion was fully briefed and argued before Judge Inzer B. Wyatt. Judge Wyatt wrote a two and a half page opinion in which he held that the motion for amendment at that time was untimely for various reasons, and I submit to you that this is taking us completely by surprise and it is even more untimely at this time. And I have a copy of the opinion here, your Honor,

if you would like to see it.

We submit that the motion should be denied.

MR. FELDSHUH: May it please the Court --

THE COURT: I am listening.

MR. FELDSHUH: May I for the purposes of this application submit to your Honor a proposed amended answer which was the subject matter before Judge Wyatt and insofar as this application is now being made, I only ask your Honor's permission to touch upon the vital issues here, namely, the allegations contained in paragraph 5 of the complaint, if your Honor could kindly look at that, sir, on page 2.

THE COURT: I am looking at it. Even in your proposed answer, Mr. Feldshuh, even in your proposed amendment to your answer, as I read this opinion in 1970, you were admitting paragraph 5. You merely wanted to deny paragraph 10.

Your present answer admits -- I am sorry, paragraphs 1, 5, 6 and 11 --

MR. FELDSHUH: 1, 5, 6, 10 and 11 we denied in our proposed answer. This morning I quite honestly didn't expect to be handed up this set of marked pleadings in the posture they are being handed up to your Honor.

THE COURT: Why didn't you expect that? I indicated

I wanted marked pleadings. That should be no surprise to you.

MR. FELDSHUH: May I say this:

In this answer there is not one word to the effect that the defendant admits any allegation of the complaint. To the contrary, he sets forth various defenses which are denials to this type of allegation. I had proposed, in light of Judge Wyatt's decision, that I would come before your Honor upon the opening of this trial and insofar as we could preserve those rights we would preserve them, so that if counsel had submitted to me this proposed set of marked pleadings before today, I assure your Honor I would have long since been here.

And may I say this, your Honor --

THE COURT: I think --

MR. FELDSHUH: May I have one more word, your Honor?

There is a pre-trial order here. The first thing that that pre-trial order does in subparagraph 1, is that the pleadings are deemed to be amended in accordance with the framing of the issues in subparagraph 8, and if your Honor will look at subparagraph 8 on page 5, issue No. 2 is:

"Is defendant liable for the full profits of the partnership with respect to the transactions in question?"

MR. PALWICK: There is no question but that is an

gwy

issue in the case. The briefs take that into full consideration.

THE COURT: I think we will proceed. As I now read the answer and the pre-trial order, I am not sure that the plaintiff's marked pleadings -- I am not absolutely sure that the word "admit" is a proper characterization of the defendant's answer as it now exists. Under those circumstances, we can proceed. It is a question of interpretation.

MR. FELDSHUH: Right.

May I just for the record, your Honor, reserve to the end of the case an appropriate motion to amend the pleadings to conform with the proof?

THE COURT: All right.

MR. FELDSHUH: I think I am permitted so to do under the rules.

THE COURT: You are permitted to do that.

MR. FELDSHUH: May I touch upon another subject, your Honor?

Your Honor, we have here a situation which I believe is addressed by Rule 12(h)(3), the issue being subject matter jurisdiction under Rule 12(h)(3), as your Honor knows, we are permitted to "suggest" to the Court, even, not necessarily on the basis of a formal motion, that there is insofar as the issues here involved going back to 1963 and for a period of time prior to August 24, 1965, that

anything tendered in that evidentiary area is barred under Section 16(b).

We claim that the Court does not have, respectfully so, of course, your Honor, subject matter jurisdiction.

In that connection, we have briefed this point in our trial memorandum on Point 3. If your Honor should so desire at this stage of the trial, and subject to your Honor's permission, of course, I would have my associate and co-counsel in this trial address the Court on that issue so that we could possibly get it out of the way at the beginning of the trial.

Thusly, our point is that subject matter jurisdiction does not exist here with regard to any transaction existing or taking place prior to August 24, 1965, predicated upon the fact that this action was commenced on August 23, 1967, and that being the two-year period involved. So if your Honor should so desire, my associate and co-counsel, Mr. Derfner, would like to address himself to that question with your Honor's permission.

MR. PALWICK: May I be heard, your Honor?

THE COURT: Yes, I think I would like to hear from Mr. Palwick first.

MR. PALWICK: The question here is whether you can sue for short swing profits realized prior to a period of two years from the date of the complaint, and this was a point

that was sought to be raised by the attempt to amend the complaint, and this was one of the specific issues that Judge Wyatt found would be untimely to be raised at that time.

The substantive issue involved is whether in light of the fact that the defendant did not disclose his transactions in Form 4's prior to two years he is not barred to assert the two-year statute of limitations, and Judge Wyatt hit that issue squarely and decided that the statute of limitations did not apply in this situation and that in any event it would be untimely to raise that issue since, as we pointed out in our answering papers, had they raised the issue in the answer, had they set that up as an affirmative defense, we could have sued the individual partnerships involved. But they let it get past the running of the statute of limitations and then raised the issue.

He found there would be prejudice, that the motion was untimely and that in any event as a substantive matter of law the defendant was wrong.

THE COURT: That is treated in this opinion?

MR. PALWICK: Yes, I believe so. I haven't read that opinion in a while.

THE DEFENDANT: If the Court please --

THE COURT: One minute.

MR. PALWICK: Bottom of page 2, the next-to-the-last sentence. "They," meaning the partnerships --

THE COURT: All right, if you will phrase your -- it would appear to me that this is now the law of the case. I want you to address yourself to that rather than to the merits of the issue.

MR. DERFNER: Yes. My name is Donald Derfner of Feldshuh & Frank, and just on the issue of Judge Wyatt's order, your Honor, I would contend that the two-year statute of limitations or two-year statutory period would run from the date that the action was initially commenced. That was August 24, 1967. And therefore, there could be no possible prejudice by amending the answer because that period is fixed in time by the statute.

The jurisdiction of this Court is created under 16(b) and it specifically says that no suit shall be brought to recover profits realized more than two years.

THE COURT: I think I have heard enough. This is an issue, it seems to me, gentlemen, that is intrinsically woven into the trial and the facts in this case, and, therefore, much as I would like to be in a position to narrow the issues, it seems to me that is impossible to do. So that what we will do is proceed with the trial. The question as to whether the statute of limitations applies

will be a matter that will be disposed of with a determination of the issues.

MR. PALWICK: Your Honor, one small matter of housekeeping.

I am a trustee of a broker-dealer in liquidation under the SIPC Act. We have a meeting of creditors tomorrow morning before Referee Herzog at 10:00 a.m. I don't think that will take too long, but I would ask your Honor's indulgence for my attendance at that meeting which has been scheduled for about six weeks now. Letters have gone out.

THE COURT: That is going to delay me a great deal. You don't have co-counsel?

MR. PALWICK: That is right. I have Mr. Hain here, who is one of my partners, as a witness. I don't think it would be proper for him to move ahead --

THE COURT: How much of an adjournment are you asking for?

MR. PALWICK: I shouldn't think it would take over a half-hour or an hour. I would expect a half-hour, but I would say an hour just in an excess of caution. So that we can get started certainly by 11:00.

THE COURT: All right, much as it distresses me --

MR. PALWICK: I can't change it, your Honor.

THE COURT: I know. What I will do -- all right,

we will start at 11:00 o'clock.

MR. PALWICK: Would your Honor like to hear opening argument or proceed directly.

THE COURT: No, we have spent enough time. Let's start.

MR. PALWICK: Mr. Hain.

D O N A L D C. H A I N, called as a witness by the government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PALWICK:

Q Mr. Hain, have you had a relationship in the past with Shattuck Denn Mining Corporation, the plaintiff in this action?

A I have.

Q What was that relationship?

A I gave legal advice to the corporation from 1949 to date.

Q Are you an attorney?

A I am.

Q And where are you admitted to practice?

A State of New York.

Q Do you practice in the City of New York?

A I have all my professional life practiced in the

City of New York, yes.

Q What is your professional affiliation?

A I am a partner of Burns, Van Kirk, Green & Kafer.

MR. FELDSHUH: Would you keep your voice up, Mr. Hain?

Q What is your address there, sir?

A 521 Fifth Avenue, New York City.

Q Was it part of your function as an adviser to Shattuck Denn Mining to file Form 4's which were filed for the corporation by various officers and directors?

A I assisted various officers and directors in the filing of Form 4's and if a corporate matter came up which came to my attention which would require the filing of it, I brought it to their attention and aided in the preparing of it.

MR. PALWICK: I ask this be marked Plaintiff's Exhibit 1 for identification or we can mark it directly into evidence, if you have no objection, Mr. Feldshuh. The pre-trial order provides for admitting this.

MR. FELDSHUH: What number was it on the pre-trial?

MR. PALWICK: I think it was No. 4.

MR. FELDSHUH: No objection, your Honor.

THE COURT: Gentlemen, I expect you to have all of those things settled. I will not have my time wasted in

terms of looking over documents that are going to be admitted. If you are going to submit any documents, either of you, I want you to exchange them during a recess or before we come to the courtroom so you know what is being submitted.

MR. PALWICK: They have been exchanged, your Honor.

THE COURT: I won't have you looking over documents. I want you to be prepared to make your objection when they are submitted. I think what you will have to do is the clerk -- just leave it there and we will have it marked.

(Plaintiff's Exhibit 1 was received in evidence.)

Q I show you, Mr. Main, Plaintiff's Exhibit 1 in evidence and ask you if you have ever seen the original or a copy of that document before.

A Yes, I have seen the original.

Q When did you see it

A About the date it was dated, which is July 12, 1963.

Q Did you discuss that with Mr. LaMorte, the defendant in this action?

A Yes.

Q What did you say to him and what did he say to you?

A Mr. La Morte in July or July, '63, approached me and asked for aid in filing a Form 4 which he had to file with the SEC.

MR. FELDSHUH: I am afraid I haven't heard you, Mr. Hain. I am sorry.

A Mr. La Morte approached me and said that he had a Form 4 which he wished to file with the SEC and he wished aid in preparing it, and I aided him in preparing it.

Q Did he indicate there was any particular problem with this Form 4?

MR. FELDSHUH: Objection; leading.

THE COURT: Objection sustained.

Q Did Mr. La Morte make any statements to you regarding this document?

A He said that it covered a period of time rather than a current month and he wished -- that he had neglected to file certain Form 4's which should have been filed before and he wanted to bring it up-to-date and he gave me all the data to bring it up-to-date.

Q Was there any discussion about any 16(b) liability of the corporation?

A After we prepared the data and examined it, it appeared that there had been some short term trades. I calculated the short term liability as I saw it and Mr.

La Morte promptly paid that amount without question.

Q How much was that?

A I don't recall at the moment.

Q Do you have any idea of the approximate amount?

A At the moment, I don't.

MR. PALWICK: I ask this document be marked as Exhibit 2 in evidence.)

(Plaintiff's Exhibit 2 was received in evidence.)

Q I show you Plaintiff's Exhibit 2 in evidence and ask you if you have ever seen the original or another copy of that document before today.

A Yes, I have.

Q When did you first see it?

A My present recollection is about the date it's dated, in July and August, 1963.

Q Did you have any discussions regarding that document with Mr. La Morte?

A Yes.

Q What did he say to you and what did you say to him?

A These were trades during the month of July which he said that he wished to report on a Form 4, and this was prepared and then discussed with him before he signed it.

Q Did you have any discussion with him regarding

footnotes (b) and (c) on the first page which discusses partnerships in which he had an interest?

A Yes.

Q What was your discussion on that subject?

A I have no recollection at the present time, but the whole thing was discussed as to how it was presented.

MR. PALWICK: This is September 9, 1963.

I ask that this be marked as Plaintiff's Exhibit 3 in evidence.

MR. FELDSHUH: No objection, sir.

(Plaintiff's Exhibit 3 was received in evidence.)

Q Did you see an original or a copy of this before today?

A Yes.

Q When did you first see it?

A Either late August or early September, 1963.

Q Did you have any discussion about this with Mr. La Morte?

A As in the prior ones.

MR. PALWICK: I ask that this be marked as Plaintiff's Exhibit 4 in evidence, October 8, 1963.

MR. FELDSHUH: I have no objection, sir.

(Plaintiff's Exhibit 4 was received in evidence.)

Q I show you Plaintiff's Exhibit 4 in evidence and ask when you first saw an original or a copy of that.

A Late September or early October, '63.

Q Did you discuss that with Mr. La Morte?

A As in the previous ones, yes.

MR. PALWICK: I ask that this be marked Plaintiff's Exhibit 5 in evidence, November 7, '63.

MR. FELDSHUH: No objection, sir.

(Plaintiff's Exhibit 5 was received in evidence.)

Q I show you Plaintiff's Exhibit 5 in evidence and ask when you first saw an original or copy of that document.

A I first saw this in late October or early November, 1963.

Q Did you discuss it with Mr. La Morte?

A Yes.

Q What was said by him and by you?

A I can't recall the exact words. These discussions were just to be sure that all questions had been fully and completely answered.

MR. FELDSHUH: Could I have the witness' answer, please?

(Answer read)

Q Was there any discussion regarding the two

asterisked items concerning partnerships?

A Discussions on those would have been that you are required by the form itself to indicate all indirect holdings, that is, any partnership or corporation in which you hold an interest, and that was the only discussion. It was just to reveal the full details of the type of ownership.

MR. PALWICK: I ask that this document be marked as Plaintiff's Exhibit 6 in evidence, February 12, 1964.

MR. FELDSHUH: No objection.

(Plaintiff's Exhibit 6 was received in evidence.)

Q I show you Plaintiff's Exhibit 6 in evidence and ask when you first saw an original or a copy of that document.

A February, 1964.

Q Did you have any discussions with Mr. La Morte regarding it?

A Yes.

Q In words or in substance, what was that discussion?

A Mr. La Morte brought to my attention that he had some trades in stock of Shattuck Denn Mining Corporation and asked my help in preparing a Form 4. This is based upon his statements to me about what the changes in ownership were.

Q Was there any discussion about the two asterisked items?

A Only insofar as that I told him he was required to answer any indirect holdings as well as direct holdings.

MR. PALWICK: I ask that this be marked as Plaintiff's Exhibit 7 in evidence, June 10, 1964.

MR. FELDSHUH: No objection, your Honor.

(Plaintiff's Exhibit 7 was received in evidence.)

Q When did you first see an original or a copy of Plaintiff's Exhibit 7?

A Late May or early June, 1964.

Q Did you discuss the contents with Mr. La Morte?

A Yes.

MR. PALWICK: I offer this as Plaintiff's Exhibit 8 in evidence, March 9, 1966.

MR. FELDSHUH: No objection, sir.

(Plaintiff's Exhibit 8 was received in evidence.)

Q When did you first see an original or a copy of Plaintiff's Exhibit 8?

A March, '66.

Q Did you discuss it with Mr. La Morte?

A Yes.

Q What did he say to you and what did you say to him?

A My recollection is that I prepared this based upon the stock dividend which was received on Fireproof and called his attention to the fact that it had to be filed, and he supplied me the figures and we filled it out.

MR. FELDSHUH: Your Honor, would you have any objection if I took a chair and sat up closer to the witness?

THE COURT: Go ahead.

MR. FELDSHUH: Thank you very much, sir.

THE WITNESS: I am sorry, Mr. Feldshuh. I have a problem with my throat.

MR. PALWICK: I offer Plaintiff's Exhibit 9 in evidence. That is May 25, 1966.

MR. FELDSHUH: No objection, your Honor.

THE COURT: Received.

(Plaintiff's Exhibit 9 was received in evidence.)

Q I show you Plaintiff's Exhibit 9 and ask when you first saw the original or a copy of that.

A May, '66.

Q Did you discuss the contents with Mr. La Morte?

A Yes.

Q Was this prepared based on information that he gave you?

MR. FELDSHUH: Objection.

THE COURT: Objection sustained.

Q What was said by Mr. La Morte and what was said by you in the conversation regarding this document?

A I can't recall at this time the exact words.

Q Where did you get the information that was incorporated in this report?

A From Mr. La Morte.

MR. PALWICK: I offer this as Plaintiff's Exhibit 10 in evidence.

MR. FELDSHUH: No objection, your Honor.

(Plaintiff's Exhibit 10 was received in evidence.)

Q I show you Plaintiff's Exhibit 10 in evidence and ask when you first saw an original or a copy of that.

A August, 1967.

Q Did you have any discussions with anyone regarding that document at that time?

A Some of the information I might say I saw in July, late July.

Q How did you come to see the information in late July?

A Mr. La Morte furnished me with a sheet from his accountant showing all trades which they told me they had

prepared from his stock broker records on both his own name and the partnerships in which he had an interest.

Q At that time was Mr. La Morte and the corporation under investigation by the SEC?

MR. FELDSHUH: Objection; not relevant.

MR. PALWICK: I think the relevance and materiality, your Honor, are to show the good faith which Mr. Feldshuh admits is an issue here.

THE COURT: I think a more appropriate objection to the question, in my judgment, is that you are leading the witness. If he has any information, I want him to give it to the Court out of his own mouth and not have suggestions made by your questions.

MR. FELDSHUH: If it please the Court, I have a further objection, too, and that is the relationship between this witness and Mr. La Morte at that time and whether, in the circumstances of this relationship, this was or was not a confidential communication with regard to whatever transpired anywhere else.

MR. PALWICK: If that is an objection, perhaps we should have an examination on voir dire to establish confidentiality.

THE COURT: We have to establish that, I agree. If you object on the basis of confidentiality, there has been

nothing in the record to indicate this confidentiality exists, as far as I know. If it does exist, that raises a basis for an objection which I am in no position to rule on since I don't know what the facts are. If that is the basis of your objection, Mr. Feldshuh, then you can have an examination on the voir dire and seek to establish that.

MR. FELDSHUH: All right. May I proceed, then, on the voir dire?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. FELDSHUH:

Q Mr. Hain, where did you maintain your offices from the period 1963 down to on or about 1965?

A I maintained my office at Nassau Street with McCandless & Early. I was a partner.

Q Did there come a point in time, Mr. Hain, when you maintained an office at 320 Park Avenue, New York City?

A Yes.

Q Was that the office of Shattuck Denn Mining Corp.?

A It was a room in their office which they let me use, which I used as counsel for them and also for an independent practice.

Q With regard to that particular office, was Mr. La Monte in that office as well?

A It was a separate room, Mr. Feldshuh, but it was

within the ambit of the Shattuck Denn office.

Q It was a suite of offices, is that right?

A Yes.

Q And you occupied one room?

A One room. It was my own private room in that suite of offices, that's correct.

Q And Mr. La Morte at that particular time was the president of Shattuck Denn Mining Corporation?

A That's right.

THE COURT: Was what -- president?

THE WITNESS: President.

Q With regard to Mr. La Morte's talks with you, did Mr. La Morte ever discuss with you certain of his personal affairs?

A I can't recall at the moment, Mr. Feldshuh, ever having discussed anything that didn't have to do with Shattuck Denn Mining Corporation.

Q Well, you certainly discussed these Form 4's, as you testified, is that right?

A I acted as counsel for more than one corporation, Mr. Feldshuh, and always have, and in each of these corporations I aid the officers in preparing their Form 4's. I believe most corporate counsel do that. The forms are rather -- well, they are complicated in many cases, if you

have a lot of transactions, and particularly as to indirect beneficial ownership which must be reported.

Q But you understood upon this occasion that you were advising Mr. La Morte in a professional capacity, is that right, sir?

A Yes.

Q And he was relying upon that advice, isn't that correct, sir?

A Yes.

MR. FELDSHUH: I submit, your Honor, predicated upon the testimony here, that we need no formal statement of the attorney-client relationship. The fact that Mr. Hain did advise, as he has testified, and did know that Mr. La Morte was relying upon that and it did concern Mr. La Morte's personal affairs even within this area, I submit, your Honor, there did exist an attorney-client relationship.

MR. PALWICK: I should like to ask a few questions, too, your Honor.

BY MR. PALWICK:

Q Were you ever paid by Mr. La Morte for any advice you gave him?

A No.

Q At the time that you discussed with him the preparation of Plaintiff's Exhibit 10, was Mr. La Morte represented

by independent counsel?

MR. FELDSHUH: In this matter?

Q Was he represented by independent counsel?

MR. FELDSHUH: I object to the form of the question. I don't know what "independent counsel" is.

MR. PALWICK: By counsel other than Mr. Main, let's say.

MR. FELDSHUH: I submit, your Honor, that the question must be limited with respect to the matters at issue before your Honor.

THE COURT: I don't think it does. That is too restrictive. What you are attempting to establish is whether the witness in fact had a lawyer-client relationship with Mr. La Morte.

MR. FELDSHUH: And that regardless of any other relationship he may have had with any other attorney.

THE COURT: Of course, that's true. You can't establish it by merely limiting it to the matter before the Court. That is too restrictive. Objection overruled.

MR. PALWICK: Read the pending question, please.

(Question read)

A Yes.

Q Do you know who that counsel is or was?

A Yes.

Q What is the name of the firm?

A The individual in the firm was Mr. Silliere -- I at the moment don't recall the name of the firm -- and Mr. Hanrahan.

Q I show you the answer set forth in the marked pleadings and the law firm that has signed it and ask you if that refreshes your recollection as to the name of the law firm that then represented Mr. La Morte.

A Yes, that's the law firm, Sullivan, Donovan, Hanrahan, McGovern & Lane.

Q Now, do you know who was paying that law firm at that time for representing Mr. La Morte?

A I understood that Mr. La Morte was.

Q Do you know how that law firm came to be retained?

A Yes.

MR. FELDSHUH: I don't see how this is at all relevant to the voir dire, namely, did this witness have a relationship of counsel, an attorney-client relationship, regardless of who else may have had. Mr. La Morte could have had ten lawyers for that matter.

THE COURT: The objection is overruled.

Q Will you tell us how that law firm came to be retained?

A There was an investigation of Mr. La Morte and

Shattuck Denn Mining Corporation by the Securities & Exchange Commission.

MR. FELDSHUH: I will renew my objection, sir, as to the basis for the retention.

THE COURT: The objection is overruled, and you will be regarded as having a continuing line of objection to this line of inquiry.

MR. FELDSHUH: Thank you, sir.

Q There was an investigation by the SEC. Was that the only circumstance that created the relationship of lawyer and client between Mr. La Morte and the Sullivan, Hanrahan firm? Will you tell us about the subject matter of the investigation?

MR. FELDSHUH: Same objection, sir, as the continuing objection.

THE COURT: All right.

A The investigation by the SEC was based upon the SEC's allegation that Shattuck Denn Mining Corporation had issued a false release and at the same time Mr. La Morte had traded in stock of Shattuck Denn Mining Corporation.

Q First of all, do you know the background of Mr. Hanrahan in the Sullivan, Hanrahan firm?

A Yes.

Q What is that?

A He was once an SEC commissioner.

Q Did you ever discuss the contents of Plaintiff's Exhibit 10 with Mr. Hanrahan or others in Mr. Hanrahan's law firm?

A Mr. Silliere. He had a copy.

MR. PALWICK: I submit, your Honor, we have shown there was no lawyer-client relationship between Mr. La Morte and this witness.

THE COURT: I would like to ask a few questions of the witness on my own.

MR. PALWICK: Yes, sir.

THE COURT: In your dealings with Mr. La Morte in regard to the Form 4, did I understand you acted as counsel for the Shattuck Mining Corporation?

THE WITNESS: Shattuck Denn Mining Corporation, that's right, sir.

THE COURT: As an incident of that function, you would advise officers of the corporation with regard to the matter that is now under discussion, is that correct?

THE WITNESS: That is correct. If there was anything which came to my attention that required an officer or director to file a Form 4, I would call it to his attention and aided him in preparing it.

THE COURT: Do you regard that as being part of your

function as general counsel?

THE WITNESS: In all the corporations I am counsel for, your Honor.

THE COURT: The objection is overruled.

Q After Plaintiff's Exhibit 10 had been prepared, did you have any discussions with Mr. La Morte and/or counsel for Mr. La Morte regarding liability based on the transactions reflected in Plaintiff's Exhibit 10?

MR. FELDSHUH: Can we limit it, your Honor, to either one or the other? It is a bifurcated question, and/or; which is it?

THE COURT: I think that is a valid objection. I think you ought to ask one question at a time.

Q Let's limit it to Mr. La Morte for the present. Did you understand my question?

A Yes.

THE WITNESS: May I have the question repeated?

(Question read)

THE COURT: And then you limited it first to discussion with Mr. La Morte.

THE WITNESS: Yes, I did.

Q Did you discuss it with counsel for Mr. La Morte?

A I can't recall at this time.

Q After this Form 4 had been prepared, were there

steps taken to recover any profits from Mr. La Morte?

A Yes.

Q What was the first of those steps?

A I was furnished by Mr. La Morte's accountants with the data on all the purchases and sales, that is, the cost price and the sale price in dollars.

I then matched up -- excuse me -- the accountants were then requested to match up sales which had been made within six months in any of the accounts, not within each account but matching one account against another account as well as within the same account. I want to make that clear.

I instructed them to do it at the price -- they wanted to know the price to insert. There had been a merger of the company into Shattuck Denn --

THE COURT: Keep your voice up.

THE WITNESS: I am sorry.

A There had been a merger on February 1, 1966, of a company, the Fireproof Products Company, Inc., into Shattuck Denn, which under the Securities & Exchange Act of 1934 counted as a purchase of Shattuck Denn stock at that time. They wanted to know what price should the purchase be counted on the basis of the matching. I advised them that in my opinion it was $8.75 a share, which was the market

price of the Shattuck Denn stock on the date of the merger. I so advised Mr. La Morte. Mr. La Morte said that in his view it should be $10.75. The accountants therefore, when they prepared the chart, were instructed to make up one on -- excuse me. May I look at the two prices? This is a while -- one at $8.75 and one at $10.75.

MR. FELDSHUH: Your Honor, could I have that paper makred for identification, sir?

THE COURT: Yes.

MR. FELDSHUH: May the record indicate that in the course of this testimony the witness took a piece of paper from his pocket which is now being marked for identification, I assume, sir, as Defendant's Exhibit A for identification.

(Defendant's Exhibit A was marked for identification.

THE WITNESS: Mr. Feldshuh, I prepared this when I was sitting at counsel table here. So it isn't something I brought in.

MR. FELDSHUH: May I change that, sir? We have pre-marked all of our exhibits in accordance with my usual practice. When it comes to my turn I will be offering them in very fast. So may we have this marked as Defendant's Exhibit H for identification?

(Defendant's Exhibit A for identification was remarked as Defendant's Exhibit H for identification.)

A After the accountants prepared a preliminary list I went through it to see if there were any more matches, and we found some more, and that was then resubmitted to the accountants. And the schedule which is attached to this Form 4 is the result of that.

THE COURT: In Plaintiff's Exhibit 10?

THE WITNESS: Plaintiff's Exhibit 10.

Q Is that Form 4 consistent as to facts with the forms previously filed?

MR. FELDSHUH: Objection, your Honor. It calls for a conclusion, operation of this witness' mind. That is a question of fact that your Honor must decide.

THE COURT: I think that's right. In other words, you are asking him to make a value judgement. Ask him what the facts are and not give conclusions.

Objection sustained.

THE WITNESS: Your Honor, may I make one thing clear? The Form 4 filed was on the basis of $10.75 insofar as we supplied --

MR. FELDSHUH: I didn't hear you.

THE WITNESS: The Form 4 filed was on the basis of $10.75 that was filed with the SEC.

Q I show you Plaintiff's Exhibits 1 through 10 and ask if you can point out any inconsistencies in the facts as

reported in Exhibit 10 from the facts reported in the earlier exhibits.

MR. FELDSHUH: Objection, your Honor; summarization of evidence. It is improper in form.

MR. PALWICK: It doesn't purport to be a summarization. It is asking him to pick out particular facts.

MR. FELDSHUH: Your Honor, the facts must be adduced by this witness, and I believe he has already testified as to the facts. He said he was informed by Mr. La Morte about the facts and that he thereupon reviewed these exhibits and in accordance with those comments made by Mr. La Morte the exhibits were prepared, and I think that's the whole story, may it please the Court.

THE COURT: I am inclined to agree with that. I think that there are impressions, Mr. Palwick, you may want to get at, which you are trying to get at, but it seems to me the questions are improper. You may ask the witness to tell the Court specific facts.

MR. PALWICK: I am asking him for specific facts. I am asking him for specific inconsistencies between Exhibit 10 and the earlier documents that were filed.

MR. FELDSHUH: Objection, your Honor.

THE COURT: In what respect? In all respects?

MR. PALWICK: In any material respect, if your

Honor please.

THE COURT: Then the question is improper. If you want to get before the Court any inconsistencies, then you can ask the witness to indicate what was done with regard to a specific area in regard to Exhibits 1 to 10, but the question whether there are any inconsistencies or not is not proper.

Q Are there any purchases reflected on Exhibit 10 which are not reflected on the earlier exhibits?

A Yes.

Q What are they?

A Well, of course, Exhibit 10 covers a period not covered by the exhibit just prior to it, Exhibit 9, but in addition to that, it covers some purchases and sales covering the periods covered by Exhibits 7, 8 and 9, which were not covered in those exhibits.

MR. FELDSHUH: Your Honor, I have to move to strike that answer as not responsive. We have got to know the details of what he is testifying to.

THE COURT: He has testified. All he has to do now is to eliminate the suspense and tell us what they are. That's all.

Q To the best of your ability, will you tell us what those purchases and sales are that were not covered in the

earlier exhibits but are covered in 10?

A Exhibit 10 covers a multitude of transactions. I have to sit down with it for fifteen minutes and do it. There would be many sales which should have been covered in 7, 8 and 9 which are first covered in Exhibit 10. In other words, these 7, 8 and 9 were not completed. They recorded some sales, some transactions, some purchases and sales, whereas the Exhibit 10 covering the same period as 7, 8 and 9 is much more complete, but there are quite a few.

Q Did you discuss that aspect of those forms with Mr. La Morte at any time?

A That was discussed at the time that Exhibit 10 was prepared, yes.

Q And what did you say to him and what did he say to you on that subject?

A Mr. La Morte told me that there were some purchases and sales that he had made which he had neglected to put in on 7, 8 and 9, and I advised him that we will put them in now.

He said, "The best way to have it is I will give all my brokerage statements to my accountant and he will make out a complete statement about everything which I have any knowledge of."

So I have no reason to suspect 10 isn't complete and accurate.

MR. PALWICK: I offer this as Plaintiff's Exhibit 11 in evidence.

MR. FELDSHUH: No objection, your Honor.

(Plaintiff's Exhibit 11 was received in evidence.)

Q I show you Plaintiff's Exhibit 11 in evidence and ask if you have ever seen an original or a copy of that document before.

A Yes.

Q Will you tell us what it is, please?

A This is a certification by Weiss, Berman & Sessler, the corporation's accountants, to the board of directors of Shattuck Denn in which they list the short-term trade by Mr. La Morte based upon the records supplied by Mr. La Morte to such accountants on the basis of a price of $8.75.

Q That is attributable to the Fireproof shares?

A Attributable to the Fireproof, yes.

MR. PALWICK: I point out to your Honor that shows a profit down here of $56,566, and it is the difference between this and the next exhibit based on $10.75 that constitutes the basis for our claim.

THE COURT: All right.

Q Will you identify the accountants for Mr. La Morte that you referred to before?

A That also was Weiss, Berman & Sessler.

Q So the same firm was the accountant for both Mr. La Morte as an individual and Shattuck Denn as a corporation, is that correct?

A That's correct.

MR. PALWICK: Exhibit 12, please, in evidence.

MR. FELDSHUH: No objection, your Honor.

(Plaintiff's Exhibit 12 was received in evidence.)

Q I show you Plaintiff's Exhibit 12 in evidence and ask if you have ever seen the original or a copy of that before.

A Yes.

Q Will you tell us what it is, please?

A This is similar to the previous exhibit except at this time the Fireproof Products Company stock is valued at $10.75 at the time of merger into Shattuck Denn.

MR. PALWICK: The total damages shown on this, your Honor, are $37,036.

Q Now, you testified, I believe, that there was an SEC investigation of Shattuck Denn and Mr. La Morte at one point?

A Yes.

MR. FELDSHUH: Same objection as before, your

Honor. Thank you.

Q When did that investigation commence?

A My recollection was that the SEC first came up to the Shattuck Denn office in April, 1967. I had by that time -- I was no longer at my office. I was then at 521 Fifth Avenue. Mr. La Morte was told they were coming up to see him and he called me and asked me if I would come up as counsel for the corporation. At that time Mr. La Morte I don't believe knew what they were going to inquire about.

Q And was it after that the Sullivan, Hanrahan firm was brought into the picture?

A This again was between Mr. La Morte and that firm, but I don't believe that he brought those in until a little later because at that time it was just a preliminary investigation by the SEC. Nobody had any idea what the SEC would allege or what their complaint was.

Q Did Mr. La Morte ever give you a reason for his retaining of Sullivan, Hanrahan's firm?

MR. FELDSHUH: May I have that question, please?

(Question read)

MR. FELDSHUH: Objection as to form: leading.

THE COURT: That's correct, it is leading.

Q Did Mr. La Morte ever have any discussions with you pertaining to the Sullivan, Hanrahan firm?

A Yes.

Q Do you remember the first such discussion?

MR. FELDSHUH: Could we fix the time on this discussion, may it please the Court?

THE COURT: That is what the witness is trying to do.

A It was sometime in '67. I don't know what date it occurred. At one point it appeared that the interests of Mr. La Morte and the interests of the corporation would be divergent and there would be a conflict of interest, and Mr. La Morte -- I advised Mr. La Morte he had better retain independent counsel. I believe that Mr. La Morte took this firm on the recommendation of one of his directors as being competent in this field to represent him.

Q Did Mr. La Morte so state to you?

A Yes.

Q Did Mr. La Morte ever indicate to you in any way that he had discussed the question of his liability to Shattuck Denn arising from that Form 4 filed in August 1967?

MR. FELDSHUH: May we have the question, your Honor? I am sorry.

(Question read)

Q With the Sullivan, Hanrahan firm. I didn't get that in.

MR. PALWICK: Read the question with that.

(Question read with addition of name of firm.)

A Yes.

MR. FELDSHUH: Fix the time, please.

A I have no present recollection of the time.

Q Can you fix --

A The firm -- the corporation suit was instituted against Mr. La Morte for the difference between his valuation of $10.75 and the company's valuation of $8.75 promptly after the filing of this, when Mr. La Morte indicated he wasn't going to pay that difference. At that time the Manrahan firm represented him in the suit.

MR. PALWICK: No further questions.

CROSS EXAMINATION

BY MR. FELDSHUH:

Q Mr. Hain, you testified that the accountants for Mr. La Morte were also the accountants for Shattuck Denn Mining Corporation?

A Yes, Mr. Feldshuh.

Q Do you know how long the accountants, Weiss, Berman & Sessler -- and I take it those are the accountants -- how long they had been representing the company?

A I would have to refresh my recollection by looking at the annual reports, but it was probably for two or three years before that date, Mr. Feldshuh.

Q Upon their becoming accountants for the company, you knew, didn't you, that they were also personal accountants for Mr. La Morte and members of his family?

A Yes.

Q Was there ever a time that -- I will withdraw that.

With regard to your position in respect to preparing Form 4's, did you ever have occasion to speak with any member of that firm?

A Not until the last exhibit, I believe it was Exhibit 10, the one which was filed in '67, is the only time.

Q However, prior to August of '67, you did know, as you have testified, that Weiss, Berman & Sessler were Mr. La Morte's accountants?

A I knew they represented him on income tax matters, yes.

Q And you also knew that they kept records of his transactions?

A They had for income tax records, yes.

Q Mr. Hain, aren't you also an accountant?

A No, I am not.

Q Don't you have accounting background?

A No, I have no accounting background.

Q With regard to the preparation of the Form 4's, now referring you to Exhibit 1 in evidence, Plaintiff's

Exhibit 1 in evidence, I take it, sir, that you prepared that form, did you not, as you have testified?

A Yes.

Q The form being dated July 12, 1963, is that correct, sir?

A Yes.

Q Now, it is the fact, is it not, on July 12, 1963, in drafting this form you used the word "indirect," didn't you, sir?

A Yes.

Q And with regard to use of that word, "indirect," you understood that you were applying the rules and regulations under the '34 Act, weren't you?

A Yes.

Q And particularly the rule of the SEC with regard to a definition of beneficial ownership?

A Indirect beneficial ownership, yes.

Q Indirect. And as indirect beneficial ownership, you understood, did you not, that in this connection there were partnerships?

A Yes.

Q And that those partnerships were represented by the indirect ownership on this exhibit of 75,916 shares, is that right?

A Yes.

Q Upon the occasion of preparing this legend, didn't you ask Mr. La Morte what his interest was in these partnerships and the extent of that interest?

A Yes.

MR. FELDSHUH: May the record indicate, if your Honor please, that the witness has now turned to the sixth page of Plaintiff's Exhibit 1 in evidence.

Q And with regard to the sixth page, will you tell us, sir, what appears on the sixth page with respect to Mr. La Morte's interest in a particular partnership?

A Mr. La Morte's proportionate interest in anything which was listed on the schedule as being in the name of a partnership rather than Mr. La Morte's name directly.

Q And isn't it a fact, sir, that the name up above is, and I now quote, "Joint Stock Traders"?

MR. PALWICK: Objection.

Q Isn't that so?

MR. PALWICK: Objection, your Honor. He is making the witness just read parts from the document. The document speaks for itself. He says, "Doesn't it say this here and there?" If it does, the document reflects it.

THE COURT: Mr. Palwick, I think you were doing a similar thing in regard to having the witness point up

differences in the various documents. Objection overruled.

Q Upon the occasion of the preparation of this Plaintiff's Exhibit 1 in evidence, you knew what Joint Stock Traders was, didn't you?

A I knew it was a partnership, yes.

Q And based upon your knowledge of it being a partnership, you asked Mr. La Morte, did you not, what his interest was in that partnership?

A That is correct.

Q In order to ascertain his interest it was necessary to ascertain the interest of other partners?

A No.

Q Did you know the identity of the other partners?

A No.

Q Did you ever ask as to the identity of the other partners?

MR. PALWICK: You mean prior to the institution of this lawsuit?

MR. FELDSHUH: On or about the date of this exhibit, and the date being, may it please the Court, July 12, 1963.

A Mr. Feldshuh, this is ten years ago. I can't remember now what exactly I asked Mr. La Morte at that time. It is over ten years ago.

Q But you do know that Mr. La Morte stated to you the

name Joint Stock Traders --

A Yes.

Q -- and you have no present recollection of who the other members of the partnership were?

A At the time in '63 I have no present recollection. By now I do know everything, so that I don't know when first I knew it. It may have been '63, it may have been later.

Q I see, sir, but you did on July 12, 1963, use the word on the first page of Form 4 "indirect"?

A That is correct.

Q And you understood he was reporting indirect beneficial ownership --

A That's correct.

Q -- in a partnership?

A As he is required to do.

Q And you understood, did you not, that with regard to beneficial ownership he had to indicate who the other members of that partnership were?

A No, I don't. That doesn't say that in the regulations, Mr. Feldshuh.

Q And you don't recall that it said something about "spouse"? Does the regulations say anything about spouse?

A The regulation says, Mr. Feldshuh, that you can put, if you wish, how much your own beneficial interest is. In

any event, you have to give the whole ownership of the partnership in which you have any interest whatsoever.

Q And it was predicated upon that that you verified these percentages now appearing on page 6?

MR. PALWICK: I object to the form of the question. The witness didn't say he verified anything. He said he got the information from Mr. La Morte. The word "verified" comes from counsel.

THE COURT: The witness can answer and clarify it in his answer.

A I received the information from Mr. La Morte.

Q Now you have, have you not, on page 8 of Plaintiff's Exhibit 1 in evidence Willard J. La Morte Agent?

A Yes.

Q Is that right, sir?

A Yes.

Q Upon the occasion of the preparation of this form, you asked Mr. La Morte what is Willard J. La Morte Agent?

A Yes.

A And he told you it was a partnership?

A Yes.

Q And did you ask him who the partners were?

A I don't recall now.

Q I beg your pardon?

A I don't recall now. He was only required to give the whole ownership of Shattuck Denn by the partnership but he could voluntarily give his proportionate interest.

Q Didn't it strike you, Mr. Hain, that if the other partner in this Willard J. La Morte Agent was his wife that Mr. La Morte would be obliged to state the whole interest?

MR. PALWICK: Objection to the question. It calls for the witness' state of mine, operation of his mind.

MR. FELDSHUH: May it please the Court, the witness is a lawyer. He claims that he was totally familiar with the SEC regulations on the occasion of the preparation of this report. He was called upon by that special knowledge to aid and assist in the performance of his duties Mr. La Morte in the preparation of Form 4.

THE COURT: I have now lost the question. Read the question.

(Question read)

THE COURT: Answer it.

A He stated the whole interest.

Q That of his wife, too?

A That of the partnership.

Q That of the partnership?

A I think you will find that that satisfies the SEC. Anything else you state is voluntary.

Q Did you at that time advise Mr. La Morte that if the other partner was his wife or the other partners were members of his family that that would come within the concept of beneficial ownership?

A We have already stated the whole partnership. I don't see the purpose of your question. I don't understand it.

Q With regard to Willard J. La Morte Agent, regardless of your comprehension of my question, it is the fact, Mr. Hain, that you did know the identity of this partnership on July 12, 1963?

A I don't know what I knew in 1963, Mr. Feldshuh. That is over ten years ago.

Q And the fact that this is now in evidence and you have identified it as a form that you prepared on or about the date it bears doesn't refresh your recollection as to what Mr. La Morte told you or what you found out?

A Mr. Feldshuh, I already said if you state the whole ownership of the partnership you have satisfied the SEC. I don't recall at the moment about how many other details we wanted. It isn't necessary.

Q Fine. However, it is necessary to have revealed to you that there is a partnership in which Mr. La Morte has an interest?

A That is correct.

Q And you so advised him?

A Yes.

Q And upon the occasion of that advice, he told you these things, that there are partnerships?

A I knew there were partnerships and so stated in that form, yes.

Q Right. And there is also at the very last page of this exhibit a legend, "Willard J. La Morte Partnership"?

A Yes.

Q And then toward the bottom you have the following legend: "Willard J. La Morte prpportionate interest in the above partnership 1963, 25 per cent." Is that correct?

A Yes.

Q So it is the fact, sir, that upon the occasion of the preparation on or about July 12, 1963, of Plaintiff's Exhibit 1 in evidence, that you knew that Mr. La Morte had interests in three partnerships?

A Yes.

Q And each of them bearing the name Joint Stock Traders --

A Various things.

Q -- Willard J. La Morte Agent and Willard J. La Morte Partnership?

A That is correct.

Q Upon the occasion of the preparation of Plaintiff's Exhibit 1, didn't Mr. La Morte give you a record of some kind with regard to the transactions that took place so that the preparation of this report by you could be consistent with that record?

A He supplied me with a pencil list of the trades, yes.

Q Upon that occasion didn't he identify that pencil list as coming from his accountants, Weiss, Berman & Sessler?

A I don't recall that, Mr. Feldshuh.

Q But it might have happened?

A Might have, but I don't recall him saying it came from the accountants at all.

Q Now, sir, it is the fact that on August 2, 1963, now referring to Plaintiff's Exhibit 2 in evidence, that again there appears the legend "Acquired by Willard J. La Morte Partnership" --

A Yes.

Q -- "in which I have a 25 per cent interest"?

A Yes.

Q And Joint Stock Traders?

A Yes.

Q Also a 25.20 per cent interest?

A Yes.

Q And he also went further, and I am sure on your advice, "Total holdings of various partnerships in which I have a propcrtionate interest from 22.53 to 25.20 percent," is that right, sir?

A Yes.

Q And it is the fact, too, that on September 9, 1963, in the preparation of Plaintiff's Exhibit 3 in evidence, again there is a legend of indirect ownership?

A Yes.

Q And you assisted in the preparation of this form?

A Yes.

Q You understood, did you not, with respect to the indication of indirect cwnership that represented the various partnerships?

A Yes.

Q Did there ever come a point in time, Mr. Hain, where Mr. La Morte said to you, in words or substance, that he no longer has an interest in those partnerships?

A No.

Q Did there ever come a time during the entire period that you were preparing these reports for Mr. La Morte, these Form 4's, where he ever said to you, "Don't report a transaction with respect to the partnerships"?

A No.

Q With regard to Plaintiff's Exhibit 10 in evidence, isn't it a fact, sir, that Plaintiff's Exhibit 10 in evidence covers trades or transactions with respect to the partnerships?

A Yes.

Q With regard to this Exhibit 10 in evidence, did you report in here his proportionate interest in these partnerships?

A Yes.

Q You did, right?

A Yes.

Q And it was this upon which you based his liability, is that right?

A No.

Q Was this one of the facts?

A I considered the fact that he had a proportionate interest only in the partnerships, but I didn't base his liability on that.

Q With regard to your knowledge that he had only a proportionate interest in the partnerships, did that factor weigh upon you in the determination of any liability here?

A It was a factor I considered.

Q You had considered that previously, hadn't you, in

determining the liability of Mr. La Morte with respect to short swing profits?

A Yes.

Q And that was back in 1963, isn't that the fact?

A Yes.

Q And at that time when you determined his liability, so-called, you established his liability predicated upon his proportionate interest in the alleged profits, isn't that right?

MR. PALWICK: Objection. There is no testimony to that effect.

MR. FELDSHUH: Sorry.

MR. PALWICK: There is no testimony to that effect.

MR. FELDSHUH: There is testimony, your Honor, that Mr. La Morte did pay a sum of money back in 1963 with regard to your determination, meaning Mr. Hain's determination, of the existence of short swing profits. The witness so testified and it's in that area that I am interrogating.

MR. PALWICK: That is correct, but there is no testimony it was based only on a percentage interest in the partnerships, and I think his question assumes that.

THE COURT: It is cross examination and I think the witness is very competent. Objection overruled.

THE WITNESS: May I have the question, your Honor?

MR. FELDSHUH: Could we have the question again, please?

(Question read)

A That was with respect to 1963, Mr. Feldshuh?

Q Yes.

A Yes.

Q And the partnerships which allegedly had these profits were the same partnerships which allegedly had the profits in 1967 pursuant to this report, referring to Plaintiff's Exhibit 10?

A No.

Q Different partnerships?

A I think some of them differed, you will find, Mr. Feldshuh.

Q But, at any rate, with regard to establishing his liabilit in relation to his proportionate interest, you didn't do that in connection with the trades referred to in Exhibit 10?

A That's correct.

Q You testified that Mr. La Morte, upon the occasion of the preparation of Exhibit 10, told you that he neglected to file Form 4's, is that right? Isn't that the word you used, "neglected"?

A I couldn't say at this time the word used, but

certainly he said he hadn't included it.

Q Do you remember your testimony a few minutes ago?

A I do, Mr. Feldshuh, but I don't remember the exact word, whether he said "neglected" or he said "hadn't."

Q You don't recall testifying that Mr. La Morte said he neglected --

A My present recollection is his word was "neglected."

Q I am sorry.

A My present recollection is he said "neglected," but you are talking about seven years ago.

Q And with regard to the situation in 1963, didn't he use the same word, that he neglected or failed?

A He used the same approach, yes.

Q He never said to you, in words or substance, that he intentionally concealed the fact of these transactions?

A No.

Q It is the fact, sir, with regard to the transactions --

MR. FELDSHUH: I will withdraw that, your Honor.

Q Sir, it is the fact, is it not, that the schedules annexed to Plaintiff's Exhibit 10 in evidence refer to transactions going back to April 30, 1964, is that right?

A That would refer to May, 1964.

Q May, '64?

A Yes. This says "after," so beginning in May, 1964,

this covers transactions from there through July, 1967.

Q In May of 1964, Mr. La Morte was president of the company?

A Yes.

Q Was your office still up at 320 Park Avenue, New York, New York?

A May of '64?

Q Yes, sir.

A No, I believe it was at -- I believe I was at 40 Wall Street at that time.

Q I am sorry, sir?

A I believe I was at 40 Wall Street in May, '64.

Q May of '64?

A Yes.

Q So you have no definite recollection one way or another?

A I can work out the dates for you.

Q It's all right. It is a fact, is it not, now referring --

A I believe I first -- just to answer your question -- I believe I was first -- just a minute.

Q Please look at it.

MR. FELDSHUH: Let the record show the witness is now consulting Defendant's Exhibit H for identification.

A I guess I don't have it on there. My recollection is I was there first in May, 1965.

Q At any rate, in May of 1964 you were in touch with Mr. La Morte?

A Yes, I was still counsel for Shattuck.

Q Were those frequent communications between you?

A Yes.

Q Would it be fair to say it was almost on a daily basis?

A No, it wasn't a daily basis, Mr. Feldshuh.

Q Several times a week, certainly?

A I doubt that often.

Q At any rate, you were in constant communication?

A From time to time, yes.

Q Sir, Plaintiff's Exhibit 2 bears the date August 2, 1963 and it makes reference to transactions in these various partnerships, is that right?

A Yes.

Q Please look at it. Now, sir, annexed to this exhibit, now referring to Plaintiff's Exhibit 2 in evidence, you see pages with certain handwriting on it, don't you?

A Yes.

Q That's not your handwriting, is it?

A No, that's not mine.

Q Now referring to all of the three pages annexed to

the Form 4, none of that is your handwriting?

A No.

Q Is that correct?

A That's right.

Q That was not on the Form 4 when you filed it, isn't that right?

MR. PALWICK: I don't think there is any testimony that Mr. Hain filed this as such.

Q At the time you prepared it. Excuse me, sir.

A No, this wouldn't have been attached to it because the schedule you are pointing to refers to sales and the cover sheet doesn't refer to anything sold. So I wouldn't have filed it in that form, no. It was impossible.

MR. FELDSHUH: May it please the Court, may I at this time ask that these attached sheets which the witness has now indicated were not part of Form 4 upon the occasion when he prepared or knows about the preparation of this particular exhibit, in fact, has now testified he wouldn't have done it in this form at all, may they be deleted from the exhibit, your Honor?

MR. PALWICK: Your Honor, as I previously told counsel, these copies were taken directly from the SEC files and counsel has stipulated that this document may be admitted in evidence. I therefore think it improper to make this

motion at this time.

MR. FELDSHUH: May I say, your Honor, for the record that I didn't discover this fact until a few days before the trial and I had been under the assumption almost in the same manner as the witness that no exhibit would be proffered to me in the course of a pre-trial conference in that context when in fact these schedules didn't exist or were part of the exhibit.

MR. PALWICK: Theywere taken from the SEC files, so they came from somewhere. The SEC didn't invent them.

MR. FELDSHUH: Your Honor, I don't know whether they were taken from the files or where they came from, but I know as far as this witness is concerned he has now on this record stated he didn't prepare it.

THE COURT: I think the witness who was called upon to identify these documents cannot identify some portions of them.

MR. PALWICK: We didn't offer them through this witness as such. I offered them in evidence before I had the witness testify as to this on the basis of the stipulation contained in the pre-trial order. If you look at the pre-trial order which is signed by both counsel, page -- what exhibit are we talking about now?

THE WITNESS: This doesn't look like it applies to

this, Mr. Feldshuh. This is just one sheet, and this looks like it applies to something else. This doesn't apply to this. This exhibit is the form. This just doesn't apply to this. This is attached to the wrong one. Where is 1?

MR. PALWICK: Here is 1.

THE WITNESS: This isn't the way I prepared them.

MR. FELDSHUH: At any rate, may it please the Court, even if counsel did make a mistake, I assure you, sir, it was not wilful.

THE WITNESS: That is only a portion of it.

MR. FELDSHUH: It is at best a matter of inadvertence predicated upon the fact that when counsel is tendered an exhibit in a pre-trial conference as bearing a certain foundation, I would accept that. As far as I could see until a very minute examination takes place, it now becomes apparent that these papers were never attached to the Form 4 as filed by Mr. La Morte and as prepared by this witness, and in the interest of justice and in those circumstances may I ask that they be deleted?

THE WITNESS: At a quick glance, it looks like this is an SEC addenda to Exhibit No. 1. It isn't a question of it not being on file with the SEC but it is a question of not having been filed by Mr. La Morte. It looks on a quick glance that this is an SEC summary of what Mr. La Morte put

on Exhibit 1, a prior exhibit.

THE COURT: It seems to me --

THE WITNESS: Checking the dates it can be easily ascertained. This looks like an SEC summary of Exhibit 1. When you pull the file you get everything they have in the file.

MR. FELDSHUH: In the circumstances as now appears on the record, may it please the Court, may I request that this portion with the attached three pages of Exhibit 2 in evidence be deleted and removed from this record?

THE COURT: All right.

MR. PALWICK: Your Honor, this is the way we got the document from the SEC when we ordered copies, and I submit Mr. Hain's explanation on the record and the document can be taken for whatever it is worth but it should remain in evidence.

MR. FELDSHUH: Your Honor, this witness says -- excuse me.

THE COURT: I will give the matter some thought. It would appear to me that if you got the documents from the SEC files, the easy way to do that in terms of it is to have some certification from them that it is part of their files. Then I would have no problem with it.

The second question is do you need those attachments

for the purpose of this case?

MR. PALWICK: I was just going to say that the practical way to handle it is let it go over until tomorrow and give us a chance to examine these documents.

THE COURT: We can save some trouble if it is not pertinent to your case. I thought what you were trying to find out when you examined the witness was what information had been given to him by Mr. La Morte and what he had filed.

MR. PALWICK: That plus Mr. La Morte's bad faith that after having had to pay in '63 he went on with his course of conduct.

THE COURT: That doesn't have anything to do with what Mr. La Morte did or information he gave to the witness. It is what the SEC found.

MR. PALWICK: That is true.

MR. FELDSHUH: I take it for the record your Honor is reserving your ruling on that point?

THE COURT: Yes. The plaintiff will be given the opportunity to look over the documents and possibly tomorrow morning they may be willing to consent to the deletion. At least I will be prepared to rule on it.

Q Sir, you had a talk with Mr. La Morte on or about October 8, 1963 with regard to transactions in connection with the partnerships?

A Yes.

Q Now referring -- as the same appears on Exhibit 4 in evidence?

A Yes.

Q And you did note that there were transactions with regard to the partnerships, is that right?

A Purchases, no sales.

Q Transactions?

A That's right.

Q Either purchases or sales?

A Yes.

Q How did you get that information?

A From Mr. La Morte.

Q Did he ever tell you in words or substance he wasn't going to give you that information?

A No.

Q Did you ask Mr. La Morte in words or substance whether there were any transactions during the month of September?

A No, it was volunteered by Mr. La Morte.

Q He also volunteered the information contained on Plaintiff's Exhibit 2?

A That's correct.

Q And that was on August 2, 1963?

A Yes, on or about.

Q And he also volunteered the information, did he not, on Plaintiff's Exhibit 3 in evidence?

A Yes.

Q On or about September, 1963?

A Yes.

Q And he volunteered the information, did he not, on November 7, 1963, with regard to the transactions in the partnerships?

A Yes.

Q And the partnerships there were Joint Stock Traders and Willard J. La Morte Agent?

A Yes,

Q And he volunteered information with respec t to the partnerships on or about February 12, 1964, is that right, sir?

A Yes. Of course, I would have brought to his attention the stock dividend, and we would have had a discussion and that would have been one of the things that would have flagged that every officer and director had to review -- had to file one because of the stock dividend. Therefore, I may have initiated this, and probably did, rather than Mr. La Morte. The rest were all initiated by Mr. La Morte.

Q And, as far as you know, they were voluntarily initiated, you didn't press him for it?

A I didn't have to press Mr. La Morte for information on the Form 4's.

Q Sir, during the course of your direct testimony you made reference particularly to Exhibits 7, 8 and 9. Do you recall your testimony, sir?

A Yes.

Q With regard to Exhibit 7, that is dated June 10, 1964, is it not?

A Yes.

Q The information contained on this exhibit was given to you on or about June 10, 1964?

A Yes.

Q Was this information given to you voluntarily?

A Yes.

Q There is a reference to Joint STock Traders, is there not?

A Yes.

Q Also to Willard J. La Morte Partnership?

A Yes.

Q Willard J. La Morte Agent?

A Yes.

Q And you put down here that these 82,511 shares were

beneficially owned? By "beneficially" you mean indirectly as well?

A Yes.

Q During the year 1964, Mr. La Morte was still president of the company?

A Yes.

Q Did he ever consult you with regard to personal matters concerning his children?

A I can't recall any, Mr. Feldshuh.

Q Possibly he might have?

A I don't think so. I can't recall ever doing anything that didn't have directly or indirectly some effect on Shattuck Denn.

Q Do you recall him talking with you about whether his children should have interests in any partnerships which deal or trade in stocks?

A No, I can't recall, Mr. Feldshuh.

Q With regard to these partnerships, didn't you know that these partnerships did not engage solely, in effect, in the purchases and sales of Shattuck Denn stock? Didn't you know that?

A I knew that they had other holdings.

Q With respect to your knowledge that they had other holdings, you understood that it was part of the business of

these various ventures to effect sales and purchases?

A I had no idea what the business was, Mr. Feldshuh.

Q Other than you did know they had other holdings?

A Yes.

Q Mr. La Morte told you that, didn't he?

A I can't recall who told me. I know I knew.

Q Sir, with regard to Plaintiff's Exhibit 8 in evidence, this bears the date March 9, 1966?

A Yes.

Q And this is a Form 4 which you prepared, did you not?

A Yes.

Q And you prepared this without Mr. La Morte volunteering anything?

A No. I would never have prepared something without consulting with him.

Q But you initiated the report this time, didn't you?

A I initiated all those which indicate a stock dividend or a merger. Because I knew everybody's holdings had to do so I discussed with each director the necessity of getting it done, right.

Q Exactly.

A Right.

Q So it is the fact that you didn't need any statement from Mr. La Morte in order to arrange for the filing of the Form 4 now being Plaintiff's Exhibit 8 in evidence?

A I asked him if there were any other transactions, Mr. Feldshuh.

Q You asked him, sir?

A If there were any other transactions in Shattuck stock.

Q That is what you asked him?

A Yes. I said, "You have to file it because of this. Are there any other transactions that have to be reported?"

Q As a matter of fact, on this Plaintiff's Exhibit 8 in evidence, there is a reference to these partnerships, is there not?

A Yes.

Q And the reference is to Joint Stock Traders, Willard J. La Morte Partnership and to Willard J. Morte Agent?

A Yes.

Q And did you specifically on that occasion when you prepared Plaintiff's Exhibit 8 say to him, "Mr. La Morte, did you have any transactions in Joint Stock Traders"?

A I don't see how that would be a relevant question.

You mean, "Did you have any transactions with Joint Stock Traders?" I can't answer that. I wouldn't have asked that. Did Joint Stock Traders have any transactions in Shattuck, yes.

Q Did you ask him that?

A Yes.

Q You did?

A If there were any transaction in stock. He had been reporting purchases and sales by the partnerships all along.

Q And you knew that?

A I knew that.

Q And you also knew that when this legend was put down?

A Yes.

Q And he was asked if there were any other transactions to report and he said, "No"?

A He said, "No," right.

Q How much time did you spend on asking him that question?

A This is 1966. We are now in 1973. How could I tell you how many minutes I spent on that that many years ago? But it was certainly asked at the time.

Q It was certainly asked?

A I make it invariable to ask, whenever there is something like this, "Are there any other transactions to be reported?"

Q Isn't it a fact on this occasion your office was up at 320 Park Avenue?

A Yes.

Q And isn't it a fact that Mr. La Morte's office was right next door to you?

A It was two offices away, yes.

Q Oh, come, now, it was in the same suite?

A The same suite, yes.

Q And it wasn't a gigantic suite, was it, sir?

A No.

Q Did you say to Mr. La Morte, "Let me have the records of these various partnerships so I can figure out the percentage of your proportionate interest"?

A Let me say right now when I asked for the record, when I knew there had been some unreported transactions, I was refused the records and was told I had to deal with his accountants and that I would not see the original records. I did not see any original records ever. I was never permitted to see any original records ever, and on one occasion I asked to see the original records and was told I couldn't.

Q Mr. Hain --

A I had no right to see his original records.

Q Mr. Hain, you were told to see his --

MR. FELDSHUH: I am sorry, sir.

THE COURT: Make that the last question and answer before the recess.

Q Mr. Hain, you testified that Mr. La Morte told you to ask the accountants?

A Yes, in 1967, Mr. Feldshuh. That is the only time.

Q I am talking about Plaintiff's Exhibit 8.

A He didn't tell me to ask his accountants as to Plaintiff's Exhibit 8. Only in 1967, Mr. Feldshuh.

Q Mr. Hain, in March of 1966, when you initiated this Form 4, you knew that Weiss, Berman & Sessler were the accountants for the corporation, didn't you?

A Yes.

Q You also knew upon that occasion they were Mr. La Morte's personal accountants?

A Correct. They are not to tell me their personal business with Mr. La Morte. They never have.

Q You just testified that he told you to ask his accountants and they were the same accountants.

A Only once in 1967.

THE COURT: Let's take a recess. I am scheduled to have a matter that may take about ten minutes at 3:30. So it will be about a fifteen-minute recess.

MR. PALWICK: What time will we break this evening?

THE COURT: 5:00 or 5:30.

(Recess)

BY MR. FELDSHUH:

Q Mr. Hain, you testified that you talked with Mr. La Morte sometime in 1967 and suggested to him that he ought to get outside counsel of some kind with regard to his posture in the SEC investigation, is that right, sir?

A Yes, that's right.

Q And thereupon you learned about Mr. Silver and Mr. Hanrahan coming into the situation?

A Yes.

Q Isn't it a fact, sir, that Mr. Silver and Mr. Hanrahan were retained to represent all the directors of Shattuck Denn and not Mr. La Morte personally?

A Mr. La Morte and the other directors in the first instance, that's correct.

Q In the first instance?

A Yes.

Q So it wasn't that Mr. La Morte selected Mr. Silver himself, was it?

A I believe Mr. La Morte did the selction of the firm after consulting perhaps with the other directors.

Q After consulting with the other directors?

A I presume. I have no idea.

Q Weren't you spoken with at this time?

A I knew that they were being selected.

Q Didn't the other directors talk to you and ask you about the Silver firm and Mr. Hanrahan's firm?

A No.

Q They didn't talk to you at all?

A I remember discussing it with Mr. La Morte. I don't remember any other directors.

Q Was there a director by the name of Jerry Brown?

A Yes.

Q Didn't the Hanrahan firm represent Mr. Brown?

A I don't recall at the time which of the other directors suggested the firm to Mr. La Morte. I know one of the directors did.

Q When you testified on your direct examination, you didn't mean to give the Court the impression that the Hanrahan firm represented only Mr. La Morte?

A No, they did not at that time.

Q The fact is that they represented all the directors?

A All the directors, that's right.

Q And it is possible that Mr. Jerry Brown spoke to you about the Hanrahan firm?

A What do you mean by spoke to me? Mentioned it?

Q As possible counsel representing all the directors.

A I don't recall it now at the moment, Mr. Feldshuh.

Q Do you recall Mr. Palwick's name being mentioned, the present counsel in this litigation, being mentioned with regard to the possibility of having him represent all the directors?

A I have a recollection that that was considered and discarded as being inadvisable.

Q And it was considered and discarded by all the directors, is that right?

A No, it wasn't referred to all the directors. It was considered as being inadvisable because Mr. Palwick, although not a member of my partnership, was associated with us.

Q So it wasn't as if Mr. La Morte was out searching for outside counsel, is that right?

A Mr. La Morte was out searching for outside counsel. It was just a question --

Q On your suggestion?

A It was just a suggestion of what counsel he would pick. That was up to Mr. La Morte.

Q Pick for all the directors?

A That's right. I am sure he consulted them, too.

Q I am sure he did.

With regard to Plaintiff's Exhibit 9, which is a Form 4 dated May 25, 1966, you prepared that, didn't you, sir?

A Yes.

Q This form has a very extended legend on it, does it not?

A Yes.

Q And the language of this Form 4 and that particular legend, that was your language, wasn't it?

A It probably was.

Q Can't you recognize it as your language?

A This is 1966. It looks like it might be.

Q That's lawyer's language, isn't it?

A Mr. Feldshuh, I am just saying it looks like I probably wrote it.

Q Sir, this Plaintiff's Exhibit 9 is dated May 25, 1966, and Plaintiff's Exhibit 8 is dated March 9, 1966. Do you see that, sir, just two months before?

A Yes.

Q With regard to Plaintiff's Exhibit 9, is there any indication of any trades taking place or transactions?

A Mr. Feldshuh, I am just seeing this now for the first time in a long time.

Q Suppose you try to answer the question. I think we can make it easy for you.

A No, there are no --

Q No transactions there, isn't that right?

A That is right. This is why I am wondering why this was filed. So this isn't --

Q With this big legend of yours on it, now referring to Plaintiff's Exhibit 9?

A That is why I am questioning whether this was my legend.

Q Well, this is certainly 1966, sir.

A I know, and I aided him in filing most of these during that period, but it is possible one of these was filed without my aid.

Q It is possible but not probable?

A "Possible" is what I said.

Q But you testified on direct examination that you prepared Plaintiff's Exhibit 9 and now that you are looking at it, are you changing your testimony?

A I can't --

Q Are you changing your testimony, yes or no?

A Mr. Feldshuh, I can't recall at the moment. All

I can say is I am looking at something written ten years ago. This appears to be one I did and I knew I consulted with Mr. La Morte on the ones he filed. I can't get more exact than that.

Q Just a minute, please.

THE COURT: Excuse me.

(Pause)

THE COURT: All right, Mr. Feldshuh. I am sorry.

MR. FELDSHUH: It's all right, sir.

Q Now, the fact that Plaintiff's Exhibit 9 dated May, 1966 shows no transactions reported, have you noted that, sir?

A Yes.

Q You got the information from Mr. La Morte, did you not?

A That's correct.

Q The May, 1966 Form 4 changed the direct and indirect holdings as the same was reported in March of 1966?

A I see that.

Q You see that, sir?

A Yes.

Q And you spoke to Mr. La Morte and he gave you this information voluntarily?

A Yes, but --

Q Did he give it to you voluntarily?

A Mr. Feldshuh, I might point out these aren't contiguous months. There may have been a report in between these two.

Q There may have been a report? You wouldn't know if there was a report?

A At the moment I wouldn't know.

Q So it is possible he may have filed a lot of reports that you don't know about?

A Mr. Feldshuh, if these were contiguous months I would wonder why there was a difference. They are not. There are months missing in between.

Q But there are no transactions, are there, sir?

A There may have been a report of a transaction in between those two months.

Q And this may have covered it, right?

A This may explain what you are asking me about.

Q And again I repeat, sir, and keep in mind the date of May, 1966, and that date, keeping that date in mind and keeping in mind your Plaintiff's Exhibit 10, which goes back to 1964 --

A That --

Q Excuse me, sir. May I ask the question?

A Yes.

Q It is the fact that without regard to the schedule annexed to Exhibit 10, that in the intervening time of May -- I will withdraw that -- of April, '64 to August, '67, reports were being filed, isn't that so?

A You say may have been filed?

Q I say --

A Yes.

Q -- were in fact being filed.

A That's correct.

Q And as far as you know, there may have been many other reports filed, as you just testified a moment ago?

A Correct. The only way I would find it is by asking the SEC.

Q Or Mr. La Morte?

A Or Mr. La Morte.

Q Did you ever ask him?

A Yes. Whenever we filed one we asked what the last report was, of course.

Q Why?

A So that you would be able to reconcile the two reports.

Q So that on all of these occasions when you asked, Mr. La Morte didn't on those occasions say, "I concealed

something from you," did he?

A No.

Q He spoke in a normal tone?

A Yes.

Q Any question you asked you got an answer?

A I had no reason to suspect that he wasn't giving me the full information when asked for it.

Q And isn't it a fact that he also said to you if you were concerned or possibly there was a discrepancy in your mind --

A We worked out what the discrepancy was caused by.

Q Right. You also knew Weiss, Berger and Sessler had a record of these transactions for their income tax purposes?

A But that would only be once a year, Mr. Feldshuh. The interim periods they wouldn't have them at all.

Q But it is a fact they did have certain records referrable to these transactions?

A At the time, no. Mr. Feldshuh --

Q Did you ever ask Weiss, Berman & Sessler, "Gentlemen, please let me see the records that you have"?

A Yes.

Q Were you ever turned down by them?

A Yes.

Q You were turned down by them?

A Yes.

Q By whom?

A Myron Berman.

Q What did he say to you?

A He said, "Those are confidential between me and Mr. La Morte."

Q When was this?

A In 1967 when I suspected some of these reports were incorrect.

Q Didn't you testify just a moment ago on your direct examination that in 1967 all the records were produced and shown to you?

A I didn't. I said the accountants had given me a compilation of the records. In any event, whatever I said, Mr. Feldshuh, that was the fact.

Q It is the fact that you did see the records in August of '67?

A No, I did not see the records in '67. I said the accountants supplied me with a compilation of records and I asked to see the records and I was turned down.

Q Mr. Myron Berman, he is a member of this accounting firm?

A Yes.

Q He was also an accountant for the corporation, is

that right?

A Yes.

Q How frequently did you see Mr. Myron Berman at 320 Park Avenue?

A Not often.

Q Wasn't he there every month?

A Oh, I saw him there from time to time. I don't remember how often I saw him but I did see him just occasionally. I saw him from time to time, yes.

Q In the performance of his work as an accountant for the company?

A He audited, but I don't know whether he was there every month.

Q On the occasions that you saw him there you also knew he was the accountant for Mr. La Morte?

A I said that, Mr. Feldshuh.

Q With regard to the preparation of Exhibit 10 --

A Yes.

Q -- didn't you draw up one schedule before the final schedule was prepared and sent in?

A I don't understand you. I had a great deal to do with drawing up that schedule, if that is your question.

Q Yes.

A The schedule was drawn up, as I told you, on the

basis of a sheet submitted by the accountants which purported to summarize all the brokerage transactions.

Q Did you have any reason to believe that that sheet was inaccurate?

A I did not, but I did ask for the supporting papers, that is, the brokerage transactions, and I was refused, as I told you.

Q And that was not refused by Mr. La Morte, was it?

A Yes, it was refused by Mr. La Morte and the accountants. The accountants were quite correct. They said it was confidential between Mr. La Morte and them and I wasn't entitled to see them.

Q Then you went to Mr. La Morte?

A That's right.

Q And then he said, "No, you are not entitled to see it"?

A He said that it wasn't actually my business and they showed other transactions, it wasn't my business to see these other transactions, and I think he probably was correct.

Q When you say "other transactions," you mean concerning other stocks?

A That's correct. If I had seen the brokerage sheets I would have seen all the transactions. I think that was

the basis -- it seemed to me that was probably the basis of the refusal.

Q So you are not trying to suggest to his Honor that the basis of the refusal was an effort on their part, Mr. Myron Berman on the one hand, a certified public accountant, and Mr. La Morte on the other hand, to prevent you from seeing the records of Shattuck Denn per se?

A That's right. I admit that.

Q Fine. I am glad that you did.

A This is why I didn't see any of these original transactions because actually it contains other information which they wouldn't want me to see.

Q Other securities and so on?

A That's right.

Q And you thought that they were justified in that regard?

A I didn't think the objection was unreasonable.

Q All right. Coming back again, Mr. Main, you did prepare a schedule. Did you submit that schedule to Weiss, Berman & Sessler?

A Yes.

Q And didn't you ask them to prepare a schedule?

A They prepared the first matching schedule and I revised it. I found some more matches.

Q And then you sent it back to them?

A Yes. So we agreed finally on what was worked out between us.

Q So there was a series of communications?

A Yes.

Q It wasn't as if there was just one schedule, another schedule --

A No, there were many, many trades, and it was a very complicated schedule and it was exceedingly difficult to make the matches. This wasn't a question of Weiss, Berman & Sessler being dishonest in doing it. It is just you could spend hours trying to make a match. There were various ways of making a match.

Q And this was complicated, was it not, by the fact Section 16(b) provides and covers the area of transactions, be they purchase and sale or sale and purchase, within less than six months?

A Yes.

Q And you always had to figure out how many days you are going to get off the six-month period, is that right?

A No, it was really a question of matching, because what you are trying to do is get the maximum gain, and there are various choices you have in matching and it will make a difference in the results to what you match with each other.

It is an exceedingly difficult thing to do.

Q And you had to be aware and you were, Mr. Hain, of the Smolowe case as to the method of proper matching and so on?

A Yes.

MR. PALWICK: Objection, your Honor. There is no issue raised by the pleadings with regard to properly matching trades.

THE COURT: I am beginning to think that some of this is irrelevant, but I think that the defendant is to be allowed some leeway in cross examination.

MR. PALWICK: He is trying to pull out some material he tried to put in the amended answer and it was refused by Judge Wyatt. That's my point.

THE COURT: He hasn't amended his answer, but the question is within the realm of relevance and I think he is entitled to attempt to prove -- to make a defense.

My problem, of course, with some of this is I think that it is irrelevant to the defense, but I am going to at least listen to some of it for a while.

MR. FELDSHUH: Thank you, sir.

Q Sir, you testified that you had placed a value of $8.75 with respect to the Fireproof shares, is that right, sir?

A Yes.

Q Did you consult with anybody prior to the time you fixed such a figure?

A Mr. La Morte.

Q Just Mr. La Morte? Anyone else?

A Mr. La Morte was the one I consulted with at the time I did it.

Q You understood that the work you were doing was valuing the Fireproof shares, is that right?

A Yes, that's correct.

Q Do you have any more notes you want to look at?

A No, I thought this was the yellow piece of paper I had up here. It isn't.

Q I have the yellow piece of paper.

A Put it up here. If I have to have a date -- you are welcome to the piece of paper. I will let you know if I have to refer to it.

Q Thank you very much.

Now that you have brought up the subject of the yellow piece of paper, you testified -- now referring to Defendant's Exhibit H for identification -- you testified that you prpeared this paper today just before the court session?

A Yes, I was doing it down there at that table.

These three lines were at the office just to refresh my memory as to when various people were elected. The rest was done at the table from the exhibits.

Q But this is all your handwriting?

A That's all my handwriting. There is your co-counsel.

Q Thank you. Didn't you know when the SEC -- I will withdraw that.

Will you tell me what you wrote here, now referring to the first line?

A That is because I knew you would ask me when I was secretary of the corporation. It was from May, '66 to March, '67.

Q You were secretary of Shattuck Denn?

A Yes.

Q You are no longer any officer of Shattuck Denn, are you?

A That was the only time I was an officer of Shattuck Denn.

Q Are you still counsel to them?

A Yes.

Q Would you mind indicating to me what the third line is, please?

A The third line was the SEC investigation of

Shattuck Denn, which began, as I noted here, April-May, 1967, and there was a stop order, as I recall, May 15th or 17th on the trading of the stock. That is because these are relevant dates I thought I might be asked.

Q Prior to your writing this notation, you had no independent recollection of those dates, did you, sir?

A A lot of these dates I had checked with the minute book up there. That is why I knew.

Q Did Mr. Palwick say to you --

A Mr. Palwick didn't discuss any of these with me.

Q He didn't suggest any of that with you?

A I talked with Mr. Palwick --

MR. PALWICK: Objection. It is privileged. Anything I said to my partner in the course of preparing for examination is privileged.

MR. FELDSHUH: I will withdraw the question, your Honor.

Q You knew you were going to -- I will withdraw that.

You planned to be ready to answer questions about the SEC investigation, is that right?

A Mr. Feldshuh, I first knew I was to be a witness at approximately 10:00 o'clock today. I was trying to prepare myself as best I could at that time. I know I was scheduled as a possible witness, but this is the first time I had been

told I was. It wasn't intended I would be. It was just in case somebody couldn't show up, which is in fact what happened, Mr. Feldshuh. We were suddenly called and my witnesses were out of town so I am filling in.

Q I show you a pre-trial memorandum which Mr. Palwick now has identified as being his paper, and I address you, sir, to paragraph 9 of this paper filed in this court and I call your attention to the name Donald C. Hain.

A Mr. Feldshuh, Mr. Palwick advised me, my partner who is in charge of this litigation, advised me I probably wouldn't be called even though I was there as a possible witness. I told you that.

THE COURT: I consider that line of inquiry a complete waste of time.

MR. FELDSHUH: Very well, sir.

Q In connection with the value of $8.75 by you, had you read the proxy statement --

A Yes.

Q -- that Shattuck Denn had sent out prior to establishing that value?

A Yes.

MR. FELDSHUH: Your Honor, the proxy statement is not in evidence at this time, although it is marked as one

of the plaintiff's exhibits and was designated in the pre-trial order as Plaintiff's Exhibit 1.

MR. PALWICK: We would be happy to offer it now as Plaintiff's Exhibit 13, I believe.

MR. FELDSHUH: May I interrupt for that purpose, your Honor?

THE COURT: I assume you have no objection.

MR. FELDSHUH: No, I don't, your Honor.

(Plaintiff's Exhibit 13 was received in evidence.)

Q Now, sir, showing you Plaintiff's Exhibit 13 in evidence, you recognize this to be the proxy statement that was sent out by Shattuck Denn Mining Corporation on or about November 5, '65?

A That isn't a proxy statement. That is its beginning at this page.

Q I beg your pardon. I am sorry. I showed you merely the face page which was the letter of transmittal. The rest of this document other than the face page is the proxy statement, is that right?

A Other than the first two pages, yes.

Q The first two pages. Did you prepare this, sir?

A No, but I knew about it and I was --

Q Did you aid in its preparation?

A Yes, I aided in its preparation.

Q Were you then associated with the law firm representing Shattuck Denn?

A No.

Q You were still house counsel for Shattuck Denn?

A I was never house counsel.

MR. PALWICK: I am trying to hear the witness. I am having a difficult time.

THE COURT: Maybe you had better come up.

Q Would you speak up, Mr. Hain?

A I had an office in Shattuck Denn. I wasn't house counsel. All the time I was at Shattuck Denn's office I had more important clients to me than Shattuck Denn. So I don't consider I was house counsel for Shattuck Denn.

Q Mr. Hain, I apologize for trying to indicate in any way, and I hope you didn't take it as such, any area of disrespect.

A That wasn't a question of disrespect, but house counsel implies I was considering my whole legal practice was Shattuck Denn. It was not so.

Q Very well. But at any rate, sir, upon the occasion of the valuing by you of $8.75, did you at that time look at Plaintiff's Exhibit 13?

A I knew of Exhibit 13, the contents of it, yes.

Q And did you know particularly of the fifth paragraph on that letter of transmittal?

A Yes.

Q What factors did Shattuck Denn consider in fixing the value as stated in Plaintiff's Exhibit 13?

A As in any case of a merger, there were various factors considered. I don't think you can pick any one factor as being the only factor. All factors were considered.

Q What factors were considered?

A The proxy statement gives the best examination, probably.

Q What did the chairman of the board of Shattuck Denn state were the factors that he and the other directors considered?

A He said consideration was given to various factors such as product strength, earning power, book value --

Q Slowly, please. Go ahead. So his Honor can hear you.

A Market price of Shattuck Denn's stock, limited marketability of Fireproof's stock, management and future growth potential.

Q Was there anything about book value?

A Book value is considered in here. Book values.

The book values of both companies was, of course, considered. That is a factor.

Q What does he say about book value?

A The most important single ratio was book value of Fireproof at December 31, '64, as compared with market value of Shattuck Denn's stock as of December 3, '64.

Q Right. Now, when you fixed or when you valued -- I will put it that way --

A Mr. Feldshuh, I didn't value it. As you know, it was the directors of both companies.

Q You didn't value it, sir?

A Excuse me. I thought you meant the ratio.

Q No. I am talking about $8.75.

A Go ahead.

Q When you so valued, did you look at the financial statement of Fireproof?

A I was aware of the financial statement of Fireproof. I had seen it.

Q Did you look at it upon the occasion when you were valuing the Fireproof stock in relation to the Shattuck Denn stock at $8.75?

A At that exact moment? I knew what the value was. I did not look at it again at that moment. I can recall at that time about what it was.

Q What was it?

A I don't recall at the moment. You're talking now about quite a few years ago.

Q I see.

Q You are now talking about seven years ago, Mr. Feldshuh. What I could remember one week, one month or one year after merger is different from what I can remember seven years after.

Q So you have no present recollection of what the book value of the Fireproof stock was in 1966?

A I have no present independent recollection, correct.

Q Having read Plaintiff's Exhibit 13, what was the book value on December 31, 1964?

A This says it was $141.85.

Q Was there any reason to disbelieve that, sir?

A No.

Q And did it state also what the ratio of value of the Fireproof share was as to the Shattuck Denn shares?

A Yes, they said 13.21 to 1.

Q And what did they say in that circumstance what the value of the Shattuck Denn share would be?

A They didn't give the book value of Shattuck Denn in this letter.

Q Did they give the market value?

A They did give the market value, which was at that time, '64, $10.75.

Q On December 3, 1964?

A That's correct. That would make it over two years before that.

Q From December 3, 1964 to December 31, 1966?

A I beg your pardon. I was going 4 to 6.

MR. PALWICK: I point out to the Court that the pre-trial order contains a stipulation that all these facts are true, that the book values are true, that the market values and so forth are true, so it is completely irrelevant to this case.

THE COURT: Mr. Feldshuh, I have allowed you a considerable leeway.

MR. FELDSHUH: I know you have, your Honor.

THE COURT: I haven't read the stipulations because I don't have the whole file, but please don't have us go over matters that you have already agreed to. It makes no sense.

MR. FELDSHUH: I see, sir. I will certainly do the very best I can.

THE COURT: If you have agreed on something and there is no contest about it, there is no point in belaboring it.

MR. FELDSHUH: Very well, sir.

Q Did you examine the statement prepared by Weiss, Berman & Sessler on the $10.75?

A Yes.

Q Plaintiff's Exhibit 12?

A Yes.

Q When you prepared these schedules and discussed them with Weiss, Berman & Sessler, didn't you mention something to them about trades occurring two years prior to the date of preparation?

A I instructed Weiss, Berman & Sessler as to the period they should cover and the prices they should use, that is correct. As you know, these were prepared on an alternate basis, one at $8.75 and one at $10.75, because Mr. La Morte disagreed as to the price to be used as of February 1, 1966, which is one of the dates used in the matches.

Q As of that date?

A Weiss, Berman & Sessler took the --

Q They prepared both, $8.75 and $10.75?

A Yes. They were going on instructions as accountants for the corporation what period to cover, that's correct.

Q And those instructions came from you?

A That's right.

Q And you gave those instructions to carry this back

to 1963, despite your reading of Section 16(b)?

A That's correct.

Q With regard to the preparation of these schedules, sir, you knew at that time, did you not, that Mr. La Morte only had a percentage interest in the partnerships whose trades were being reflected in Exhibit 10?

A Yes.

Q And also whose trades were being reflected and whose profits were being determined under Exhibits 11 and 12?

A Yes.

Q Did you ever tell Weiss, Berman & Sessler that they should figure out, insofar as Mr. La Morte was concerned, the amount of profit dependent or in proportion to his percentage interest in these various partnerships?

A No.

Q Weiss, Berman & Sessler were acting as the accountants to draw up these papers, is that right?

A Weiss, Berman & Sessler had access to the original records, so they were the ones that could check it as to accuracy. Now, they insisted to me that, of course, they couldn't guarantee the accuracy, it was on the basis of what Mr. La Morte had furnished to them.

Q Right.

THE COURT: Mr. Feldshuh, I think if you are able to justify a continuation of this line of inquiry I will let it go on, but it seems to me that the inquiry misses the point. Mr. Hain is not on trial. He is not on trial for the manner in which he prepared these reports. If matters are included which should not have been included in them, it seems to me that the better way to do it is, instead of going this way with Mr. Hain, to have your witnesses show what the real facts are.

I think this is totally irrelevant and I want it to stop. It seems to me that what has been happening, and I have allowed you to go at considerable length,is that you are not really reaching anything at all that is in contest in this matter. I don't like to have my time wasted this way.

MR. FELDSHUH: I am sorry, sir.

THE COURT: You are to be permitted to present the facts, but I want pertinent material presented in regard to this and I expect you to do that.

MR. FELDSHUH: Very well, sir, I shall certainly endeavor to keep within your Honor's admonition.

Your Honor, I have one question and I am finished.

THE COURT: All right.

Q It is the fact, is it not, that in Plaintiff's

Exhibit 12, 11, Plaintiff's Exhibit 10, there is not one single transaction of Mr. La Morte's direct holdings, isn't that true?

A That's correct, they didn't change.

MR. FELDSHUH: I have no further questions, your Honor.

THE COURT: Any redirect?

MR. PALWICK: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. PALWICK:

Q I believe you have testified, Mr. Hain, that in connection with the assertion of 16(b) liability against Mr. La Morte in 1963, you asserted that liability only on the basis of a percentage of his interest in the partnerships which were doing the trading, is that correct?

A That is my recollection, yes.

And I believe that you stated that in 1967, when you computed liability on the facts as stated in Exhibit 10, that you figured Mr. La Morte's liability on the basis that he owned 100 per cent of these partnerships, is that correct?

A That's correct.

Was there a reason for the discrepancy in treatment, Mr. Hain?

MR. FELDSHUH: Objection. It is absolutely

contrary to the facts adduced and the evidence. The witness testified that he knew that he only had a proportionate interest in these partnerships, and I think, your Honor, that the only testimony that is relevant and within the issues and competent is merely that he did a certain thing in 1963, recognizing that there was this proportionate interest, and I adduced from this witness that that proportionate interest continued down to 1967.

THE COURT: All right.

MR. FELDSHUH: Now, whether there was justification or lack of justification comes within the statute and not within Mr. Hain's province here.

THE COURT: I want to hear from you on this.

MR. PALWICK: Your Honor, Mr. Hain has been cross examined here as an expert in preparing these Form 4's and he has been taken over the hurdles pretty well as far as his individual reasons for doing certain things. Now, I think the discrepancy in treatment between two years has been brought to bear and I think we are entitled to hear Mr. Hain as to his reasons for treating these two items in a discrepant fashion.

THE COURT: I allowed Mr. Feldshuh to take Mr. Hain through this because of the fact there was a possibility he would bring out something that was relevant to the

defense, but after listening to it for most of the afternoon, it is my conclusion that nothing has been relevant and there is no reason, therefore, for me to allow you to continue with irrelevance.

MR. PALWICK: As long as the testimony is in, there is this discrepancy, and I intend to limit my redirect to this point, I would like to bring out the reasons for the discrepant treatment.

MR. FELDSHUH: Your Honor, the mere fact that Mr. Palwick may have an approach to this situation such as he describes doesn't make it any more competent than it was before.

THE COURT: I don't see any purpose in that. There is no reason. I made a mistake, I must confess, to allow Mr. Feldshuh to go the way he did, but I did that because of the fact I didn't know where he was going. I have concluded all of that testimony has no relevance. There is no reason for me to allow you, now that I am aware, to allow you to continue with this.

MR. PALWICK: I am trying to straighten out the testimony that is on the record now.

THE COURT: The testimony that is on the record with regard to these matters is going to be disregarded because it doesn't appear to me any of it is relevant to the

defense at all. As I indicated before, Mr. Hain is not on trial. He prepared a form. The question about how he did it has no relevance. The facts of what was included in there either has to come from Mr. La Morte or otherwise.

MR. PALWICK: I withdraw the question.

THE COURT: Let's proceed, please.

MR. PALWICK: No further questions.

MR. FELDSHUH: No questions, then.

(Witness excused.)

R A Y M O N D J. D A V I E S, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PALWICK:

Q Do you have a business relationship with Shattuck Denn, Mr. Davies?

A I do.

Q What is your position?

A President of the corporation.

Q How long have you been president?

A February, '69.

Q Before that, what was your position?

A For a brief two months I was executive vice president and prior to that for a few years vice president.

Q Did you have a position with Fireproof also?

A I was president of the Fireproof Products Company at the time it came into Shattuck Denn in '67.

Q And when did you become executive vice president of Shattuck?

A December of 1968.

MR. PALWICK: I offer this as Plaintiff's Exhibit 14.

MR. FELDSHUH: No objection, your Honor.

(Plaintiff's Exhibit 14 was received in evidence.)

Q I show you Plaintiff's Exhibit 14 in evidence and ask you, have you ever seen that document before?

A Yes.

Q What is it?

A It's a statement, financial statement, of Fireproof Products Company for 1965.

Q To the best of your knowledge, is it accurate?

A It is, to the best of my knowledge.

Q Has Shattuck Denn Mining Corporation ever had a proxy fight in recent years?

MR. FELDSHUH: Objection; no relevance.

THE COURT: What is the relevance?

MR. PALWICK: We are going to bring out certain admissions made by Mr. La Morte in the course of that proxy

fight in meetings with Mr. Davies and others at Shattuck.

THE COURT: The objection is overruled subject to connection.

MR. PALWICK: Read the question, please.

(Question read.)

A Yes, in 1971.

Q Who was on the other side of the proxy fight, Mr, Davies?

MR. FELDSHUH: Continuing objection, your Honor.

THE COURT: All right.

MR. FELDSHUH: May I point out we are talking about 1971 in relation to transactions which had their termination I think in August of '67 or sooner.

THE COURT: I understand that. Mr. Palwick has indicated there will be some admissions that he wants to bring out by the defendant in connection with 1967. If he can do that, it will be relevant. If not, the matter will be disregarded.

THE WITNESS: What is the question?

(Question read)

A A group that was mainly -- that mainly involved the La Morte family, family interests.

Q Did you have discussions with various people purporting to represent those interests?

A Yes, we did.

Q Who were those persons?

A The two brothers, Howard La Morte, Richard La Morte, and brother-in-law by the name of Lyons, Bill Lyons, and also with Willard La Morte himself.

Q Did Mr. La Morte, Mr. Willard La Morte, make any statements to you concerning the voting of the shares held by the La Morte interests?

A It was pretty generally known, and this is not an answer, I suppose, that the amount of stock owned by the La Morte interests --

MR. FELDSHUH: Your Honor, this is obviously not responsive.

THE COURT: I don't think it is.

Q Give us the essence of any statement --

THE COURT: It is not responsive.

Q Not what was generally known but what was said to you.

A Conversations with Willard La Morte particularly, you said? That's your question?

MR. FELDSHUH: Would you fix the time, please?

THE WITNESS: I can't fix the time because it extended over a period of two or three years, '69, '70 and again in '71 at the time of the proxy fight, conversations

that related to the fact that the stock, amount of stock, owned and controlled by the La Morte family made them the dominant stockholders of the corporation, and they naturally expressed their will at what they would like --

MR. FELDSHUH: Your Honor, this is a conversation or this witness' impressions? I move to strike it out as not responsive, your Honor.

MR. PALWICK: He said they expressed their will. You may bring out the method on cross examination, if you like.

THE COURT: The problem, Mr. Davies, is you are asked to tell us particularly what Mr. Willard La Morte said to you and what you said to him. If you can recall that, then it is appropriate. It seems to me you ought not give your reaction to conversation, rather give us the conversation itself.

THE WITNESS: I would have no record of the conversation.

THE COURT: You can give us the essence of conversations.

Q Give us the conversations in substance.

A I thought I was doing that. I guess I wasn't, but, anyway, the conversations in essence were that the La Morte -- Willard La Morte and the family considered Shattuck Denn a --

in the words used -- their power base and wished to control the company through the board of directors -- especially through the board of directors.

Q Specifically, did you have any conversations relative to the make-up of the board of directors?

A Yes.

Q In 1969 or thereabouts?

A In '69, no.

Q When was the first such conversation?

A 1970.

Q And who attended the first meeting?

MR. FELDSHUH: Your Honor, I don't know where we are going. Your Honor cautioned me about relevance.

THE COURT: What has this to do with 1967? The make-up of the board in 1970, what has that to do with 1967?

MR. PALWICK: These partnerships continued in existence and one of our contentions is that Willard La Morte was a partnership for all practical purposes, he controlled it in any way he wanted, and I want to bring out he so stated to Mr. Davies, if it came to a showdown he would vote the partnerships against the management and they had better resign or get out.

THE COURT: Conceivably that conversation could be

relevant -- let me finish, Mr. Feldshuh.

MR. FELDSHUH: I am sorry. I apologize.

THE COURT: -- but I don't see that the conversation about the make-up of the board of directors is leading to that revelation.

MR. PALWICK: That is the context in which I am going to bring out these conversations. I had to start off somewhere. If I started off, "Did Mr. La Morte tell you so-and-so," Mr. Feldshuh will object to it as a leading question.

THE COURT: Proceed.

MR. PALWICK: Read the pending question, please.

(Question read)

MR. PELDSHUH: What year is that?

MR. PALWICK: 1970, the witness testified.

THE WITNESS: As I recall the meetings in '70, there were many of them in the spring of '70, and I would have to say that some of these meetings the board of directors at that time were present, not necessarily Willard La Morte was present, although he was at one of the meetings, but they occurred in the early part of '70 with the board of directors, I would say, and Willard.

Q And what did Mr. Willard La Morte say at that meeting?

A He expressed his desire to have his nominees on the board of directors, certain nominees of his on the board of directors, giving control to him of the number on the board.

Q Is that all he said?

A With the added implication that he had enough strength, voting strength, to accomplish the purpose or -- yes, leave it go at that.

Q Give us the substance of each conversation after that up until the proxy fight.

MR. FELDSHUH: May I have that question, please?

(Question read)

MR. FELDSHUH: Same objection, your Honor.

MR. PALWICK: With Willard La Morte, of course.

A I had not many conversations with Willard La Morte in the year 1970, following that. I can't recall but one or two, and after the spring of 1970 passed when the board elected -- the directors were elected and did not include a majority of the La Morte directors, it died off for 1970 and there was very little conversation during the year with Willard La Morte during the year '70.

Q What happened in '71?

MR. FELDSHUH: Same objection.

THE COURT: You don't have to repeat it. You have

a continuing objection.

A Early in '71, the corporation was warned again, the directors of the corporation were warned again that there would be a proxy contest at the May meeting for control of the board if they did not get the control, numerical control, prior to that meeting. There were several meetings held at which Willard La Morte was present with the chairman of the board and myself and Mr. Cameron. There were other meetings held with the brothers and brother-in-law at the Cornell Club with the chairman of the board and myself, and in these conversations, expressly one in March of '71, where the family, that is, the two brothers and the brother-in-law were present, they expressed dissatisfaction with what Willard La Morte had done to them through this proxy situation and didn't want to go into a proxy contest and said that they were -- if he was going into it they were going to back him as they always had with everything they had and he would vote the family interest completely and dominate anything that they had of their stock holdings but that was the end, if he couldn't make it that time, that was it.

THE COURT: I think that --

MR. PALWICK: I am finished.

MR. FELDSHUH: Apart from moving to strike, your

Honor, I have no questions.

THE COURT: I think the motion to strike is well taken.

MR. PALWICK: Motion to strike what?

THE COURT: At least the last response. I don't know that anybody other than Mr. La Morte is being sued and what I have to hear is not from the members of the family but Mr. La Morte himself. Nobody else is being sued other than Mr. Willard La Morte, isn't that correct?

MR. PALWICK: That is correct.

THE COURT: You may cross examine.

MR. FELDSHUH: I have no cross.

(Witness excused)

MR. PALWICK: These are the only witnesses I have today. We can go on at 11:00 with the other witnesses.

THE COURT: All right, gentlemen. We will proceed tomorrow with the case at 11:00 o'clock. Let me suggest to both of you gentlemen now that I don't know how -- how long do you think you will take?

MR. PALWICK: It depends, of course, on the cross examination.

THE COURT: How many witnesses do you have?

MR. PALWICK: I have three more witnesses. Possibly I will cut it down by tomorrow, two. In any event,

gwy

of the three, and one of those may not appear. My expert, I will take an hour or an hour and a half with him.

THE COURT: How many for you?

MR. FELDSHUH: Three.

THE COURT: You had better have them here tomorrow.

MR. FELDSHUH: I shall, your Honor.

THE COURT: We will meet tomorrow at 11:00 o'clock.

MR. FALWICK: Would it be possible for us to know the order of the defendant's witnesses tomorrow?

THE COURT: You can discuss that.

(Whereupon, an adjournment was taken until March 22, 1973, at 11:00 a.m.)

- - - - -

SHATTUCK DENN MINING CORP.,

vs. 67 Civ. 3222

WILLARD S. LA MORTE

March 22, 1973
10:40 a.m.

(Trial resumed.)

MR. PALWICK: We have one matter that came up yesterday as to the exhibits. There were three pages attached to Plaintiff's Exhibit 2 that the defendant questioned. We are perfectly happy to delete those pages and I will delete them physically from the exhibit, with your Honor's permission.

THE COURT: All right.

MR. PALWICK: Now I will call as my first witness Dugald A. Cameron.

DUGALD A. CAMERON, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PALWICK:

Q Mr. Cameron --

THE COURT: Mr. Cameron, you will have to speak very loudly both for the reporter and for counsel and for me. Please keep your voice up.

Q What is your present business affiliation?

A Chairman of the board of Fireproof Products Company and director of Shattuck Denn Mining Corporation.

Q Is Fireproof Products Company a subsidiary of Shattuck Denn?

A It is.

Q Did there come a time when you entered into a partnership in which Mr. Willard J. La Morte was a member?

A Officially, no, from 1959 on. Prior to that time I don't remember a written agreement but we did act together, members of the La Morte family and I.

Q Were you not directly or indirectly a member of the Joint Venturers starting in 1959?

A At that time I had brought my daughter into it and she became the official member of the Joint Venturers, which later became a partnership.

Q And who received the annual reports?

A When there were annual reports they came through me.

Q In other words, your daughter was your nominee in connection with that partnership, is that correct?

A Yes, that is correct.

Q Were you ever consulted by Mr. La Morte as to any investment decisions that had to be made?

MR. FELDSHUH: Fix the time, please.

Q At any time when you were a member of that particular partnership.

A I didn't understand. The gentleman said something here which I didn't get.

Q Don't pay any attention to it.

MR. FELDSHUH: I am sorry.

MR. PALWICK: There is a pending question and it is not up to you to rule on objections.

May we have the question, please?

(Question read)

A That is a very broad question and I cannot give a categorical "no" because we had been interested in real estate and building.

THE COURT: What difference does it make, anyway, whether he was consulted or not? Is the issue as to whether or not he and Mr. La Morte were in a partnership, isn't that what the issue is?

MR. PALWICK: The point we are trying to prove is that Mr. La Morte controlled the partnership as a practical matter, that he did not consult with his partners.

THE COURT: Don't you determine that by making some determination as to what his partnership interest is? Isn't that the way to determine that?

MR. PALWICK: I don't believe so.

Q What was the business of this partnership?

A It had been purchasing real property and building and it then became an investment partnership. At that point I had very little, if any, specific information, when it became an investment partnership.

Q What do you mean by "an investment partnership"?

A Purchase and sale of stocks and bonds.

MR. PALWICK: No further direct.

THE COURT: Does it have a name?

THE WITNESS: The name of the partnership?

THE COURT: Yes.

THE WITNESS: It had a name in 1959 and in the revised partnership in 1964.

BY MR. PALWICK:

Q What were those names?

A My recollection is Joint Venturers back in '59 with a second name, and then in '64 it became the Willard J. La Morte Partnership.

MR. PALWICK: Nothing further.

CROSS EXAMINATION

BY MR. FELDSHUH:

Q Mr. Cameron, with regard to your daughter being your nominee, and as you testified all papers were sent to

you, you had a contact with Mr. Willard La Morte throughout this entire period, did you not?

A Yes, indeed.

Q You were business associates not only in Fireproof but also in Shattuck Denn?

A Not at that time, not back in '59 or '64. I had no contact with Shattuck Denn.

Q But you did have contact through Fireproof?

A With Mr. La Morte.

Q With Mr. La Morte. And he was your business associate?

A He was not a part of Fireproof Products Company at any time except as a director.

Q And as such director you had contact with him, did you not?

A At our directors meetings.

Q There was a time when Mr. La Morte's father and you were very closely associated in business?

A Very true.

Q And this Joint Stock Traders Corporation, wasn't that with William F. La Morte, the father of Willard?

A From '59 until a revised agreement in '64.

Q It was William F. La Morte?

A William F. La Morte.

Q And the revised agreement of '64, it became Willard J. La Morte Partnership?

A Correct.

Q I see. As the Willard J. La Morte Partnership, did you have your daughter or someone else in that partnership as your nominee?

A The same daugher and a son-in-law.

Q Both of them being nominees?

A No. In '64 the son-in-law became the nominee with power to sign papers but the daughter and some other partners had no power to sign any papers.

Q I see. But your son-in-law definitely had power?

A Correct.

Q What was his name?

A Robert A. MacLeay.

Q From time to time weren't there meetings amongst the partners with regard to the posture of the activities of the partnership?

A I can recall of no such meetings.

Q Do you recall of no conversation with William F. La Morte referrable to the activities in the trading account?

A I believe he did not know of the investments, or, if he did, I did not know from him.

Q However, you could ask, couldn't you, sir; nobody told you not to ask?

A I did ask Mr. William F. La Morte at times but didn't get any specific information. We had no reports as to individual investments before -- that I can recall -- before 1967.

Q Sir, with regard to the activities in those partnerships, didn't you file income tax returns referrable to those transactions?

A Yes. Mr. Weiss, my accountant, handled that.

Q And in those income tax returns didn't you reflect your proportionate share of profits?

A Are you speaking of my own return?

Q Well, let's take your own return insofar as there were profits. Didn't you report them?

A I was not a member of the partnership.

Q Despite the fact that these people were really your nominees?

A That's right.

Q I see. So, as far as you know, you had nominees in the partnership but you are not sure whether Weiss, Berman Gessler, your accountants, picked up the profits that were made in those partnerships in your name?

A I don't understand your question.

Q I will try it again, Mr. Cameron.

You testified a moment ago that you did file income tax returns, did you not, sir?

A Right.

Q All right. And you also testified that you had nominees in the Willard J. La Morte Partnership starting in 1964 and prior thereto in Joint Traders, do you recall that? Is that correct, sir? You can't shake your head. You have to say "yes" for the record.

A Please ask the question again.

Q Of course. Prior to 1964, as I recall your testimony, your daughter was your nominee in Joint Stock Traders, right, sir?

A Yes, sir.

Q And subsequent to Joint Stock Traders and in 1964 it became the Willard J. La Morte Partnership?

A Correct.

Q And in that partnership you had your daughter and your son-in-law, Mr. MacLeay?

A Correct.

Q And with regard to your daughter and your son-in-law, Mr. MacLeay, they were your nominees?

A Right.

Q Sir, I ask you with respect to the transactions

of the partnership and any profit that was made, do you know whether that profit was reflected in your income tax return?

A That profit would accrue to the son-in-law and the daughter.

Q I see. As being your nominees?

A Right.

Q Did you ever have occasion to ask your accountants, Weiss, Berman & Sessler, as to what the profits were, if any?

THE COURT: Mr. Feldshuh, tell me if I am wrong. You and Mr. Palwick tell me if I am correct.

I gather that the contention here is that in this partnership Mr. La Morte had a controlling interest and I suppose by virtue of your questions you are going to try to establish that he did not have a controlling interest in the partnership by showing what share of the partnership profits he participated in. It seems to me, if I am right, that is where you are going, that a far more direct way to reach that point would be by you to submit - which I am sure you are going to -- the accountants' return of the partnership for the years in question and we can eliminate this.

MR. FELDSHUH: Very well. It is my intention to

do so.

THE COURT: I gather that Mr. Palwick's contention is despite what the accountants' figures show that as a matter of fact Mr. La Morte exercised a controlling interest and actually operated as the controlling force in the partnership, is that right?

MR. PALWICK: He used these partnerships to trade back and forth.

THE COURT: What I am going to suggest, Mr. Feldshuh, is that you have a pretty direct way at least to establish your point, it seems to me, without this.

MR. FELDSHUH: All right.

THE COURT: I don't think Mr. Palwick has thus far, at least not to my mind, established through this witness, conclusively established through this witness, that Mr. Willard La Morte did in fact exercise control in regard to the partnerships. I don't think he has established that conclusively. It seems to me that you have a more direct way to prove your point.

MR. FELDSHUH: I see, sir. I shall endeavor to do so, your Honor.

BY MR. FELDSHUH:

Q Sir, I show you a copy, a Xerox, a photostatic copy of a paper and I ask you, sir, do you recognize that

copy as containing a copy of your signature?

A That is my signature, yes.

Do you mind telling me the date of that?

MR. FELDSHUH: I will offer it, your Honor, as Defendant's Exhibit I in evidence.

THE COURT: Mr. Cameron has asked for the date.

MR. FELDSHUH: This bears a date -- it bears two dates, your Honor. On the reverse side there is a date marked, and I put it in quotes, "Power of attorney filed 10/22/64," and adjacent to that under a legend, "Date account opened 1/10/57."

MR. FELDSHUH: Defendant's Exhibit I, your Honor.

(Defendant's Exhibit I was received in evidence.)

BY MR. FELDSHUH:

Q Sir, this is a signature card or a copy of a signature card with respect to the Willard J. La Morte Partnership account in the Chase Manhattan Bank, is that not so, sir?

A Yes, sir.

Q With regard to this account, sir, you see your name is on here, is it not, Dugald J. Cameron?

A Correct.

And the legend next to it is "P of A"?

A Correct.

Q You understand that to mean power of attorney, right, sir?

A Correct.

Q Sir, on the reverse side it appears that the power of attorney was filed on October 22, 1964, is that right, sir?

A That's correct.

Q Under this power of attorney, sir, and the fact that your signature appears upon the signature card of the Chase Manhattan Bank, you were authorized to sign checks on the Willard J. La Morte Partnership account, isn't that correct?

A It would so appear.

Q And looking at this card, too, it would appear that your son-in-law, Robert A. MacLeay, also was authorized to sign checks upon the account?

A As a partner in accordance with the agreement.

Q Sir, I show you this paper and I ask you, sir, do you recognize your signature on the second page thereof?

A I do.

Q Sir, on the first page thereof your name appears, D. J. Cameron, isn't that correct, sir?

A That's correct.

Q And you notice at the top are the words "Joint Stock Traders," is that right, sir?

A Yes.

Q This is a copy of a bank resolution, is it not?

A That's correct.

MR. FELDSHUH: I offer it, sir.

MR. PALWICK: No objection.

(Plaintiff's Exhibit J was received in evidence.)

Q So it is the fact, is it not, sir, in accordance with Defendant's Exhibit J in evidence that you were authorized to be a signatory upon the account of Joint Stock Traders, isn't that correct, sir?

A That's how it would appear from these papers. I have no recollection, however, of ever having signed any checks.

Q But you do have a recollection that you could have done so?

A I do now.

Q Sir, was there ever a time with regard to the partnership account, be it Joint Stock Traders or the successor partnership, Willard J. La Morte Partnership, in 1964 when you were not a signatory, an authorized signatory, upon the bank account, as far as you recall?

THE COURT: Where is all this getting us, Mr. Feldshuh?

MR. FELDSHUH: I will withdraw the question.

THE COURT: I hope you are asking questions for a purpose. I don't see the purpose of it.

MR. FELDSHUH: The purpose of that question, sir, was to demonstrate by this witness that throughout the entire period of these partnerships in relation to control of the affairs of the partnership, that he in fact was an authorized signatory to draw upon the bank account of the partnership at all times and, what is more and equally emphatic, your Honor, is that on October 22, 1964, within the period laid in the issues in this litigation, within that period, he not only was a signatory but went to the trouble of having a power of attorney filed so that he could be the signatory even though he had nominees in the partnership.

THE COURT: All right.

MR. FELDSHUH: And that, may it please the Court, is a factual situation, a documentary fact, relative to the area of control and interest in these partnerships rather than merely testimony upon which we may have just a 1 on 1 situation. That, your Honor, was my purpose.

THE COURT: All right.

Q Sir, I show you this copy and I ask you, sir,

looking at it, do you recognize any of the signatures thereon, calling your attention to the legend "Robert A. MacLeay" and your attention to Elizabeth Seeking.

A I recognize all of them.

Q With regard to Robert A. MacLeay, do you recognize that to be the signature of your son-in-law?

A That's correct.

Q And with regard to Elizabeth Seeling, do you recognize that to be the signature of your daughter?

A Correct.

MR. FELDSHUH: I will offer this, sir, as Defendant's Exhibit K.

MR. PALWICK: No objection.

(Defendant's Exhibit K received in evidence.)

Q Sir, this is a copy of a partnership account, partnership certificate with regard to an account at the Chase Manhattan Bank?

A Correct.

Q Sir, do you see the date stamp here as being October 22, 1964?

A Correct.

Q And this account, sir, is the Willard J. La Morte Partnership account?

A Correct.

Q I show you this paper, sir, a copy of a paper, and I ask you, sir, would you look at the bottom two

signatures and will you tell his Honor, is that a copy of one of your signatures?

A That's correct.

Q And that is Dugald J. Cameron, right, sir?

A Correct.

MR. FELDSHUH: I will offer it, sir, as L.

MR. PALWICK: No objection.

(Defendant's Exhibit L was received in evidence.)

Q Sir, this is a photostat of the power of attorney wherein you were appointed the designated attorney with regard to the account at the Chase Manhattan Bank, is that right, sir?

A Correct.

Q And this power of attorney, sir, was executed on February 1, 1963, is that right?

A Right.

Q Sir, I show you this paper and I direct your attention to the third page thereof and I ask you, sir, do you see a copy of your signature?

A I do.

Q And do you recognize that as your signature?

A I do.

MR. FELDSHUH: I will offer this, your Honor, as

Defendant's Exhibit M.

MR. PALWICK: What is the date of that exhibit?

MR. FELDSHUH: The date of this exhibit is July 31, 1959.

MR. PALWICK: No objection.

(Defendant's Exhibit M was received in evidence.)

Q Sir, this is the partnership agreement, is it not, with respect to Joint Stock Traders? I am now referring to Defendant's Exhibit M in evidence.

A That's correct. It seems to be one I do not have, however.

MR. FELDSHUH: Your Honor, may I just read for your Honor a very short paragraph from this exhibit with regard to this particular partnership account, and I am now reading, sir, from the first paragraph on page 2 of Defendant's Exhibit M in evidence:

"The Joint Venturers hereby appoint as their agent, William F. La Morte."

And may I stop for a moment, your Honor. William F. La Morte is the father of Willard La Morte and is not the defendant here.

THE COURT: I am aware of that.

MR. FELDSHUH: "... whose duty it shall be to open

a brokerage account with any brokerage concern and deal in and hold all of such securities so purchased in his own name for the benefit and as agent for the respective Joint Venturers and he is further empowered and authorized to open and maintain such bank accounts as he may deem necessary and advisable."

This being the father of this defendant.

Q Now, sir, I show you this paper and I ask you, do you recognize on this paper the signature of your daughter, Elizabeth Seeling?

A I do.

Q And this is a copy of her signature, is that right, sir?

A No, I recognize the name, but I do not believe that that is her signature.

Q You do not?

A Because all of these seem to be written by the same person.

Q That's as it appears to you. All right.

A May I ask the date of the other agreement you showed me?

Q July 31, 1959.

A That you showed me before?

Q That's right.

A They are both July 31st?

Q That's right.

MR. FELDSHUH: May I have this marked, your Honor, Defendant's Exhibit N for identifiation.

(Defendant's Exhibit N was marked for identification.)

Q I show you this paper and I ask you, sir, do you see on this paper your signature?

A I do.

Q And this is a business certificate for partners with respect to Joint Stock Traders, is that correct, sir?

A That's correct.

MR. FELDSHUH: Your Honor, I will offer it and I wish to point out to your Honor there is a Xerox of the County Clerk's certificate on here merely authenticating that this is a true copy.

MR. PALWICK: No objection.

(Defendant's Exhibit O was received in evidence.)

MR. FELDSHUH: And for the record, your Honor, this appears to have been acknowledged on December 9, 1959.

Q Sir, I show you this paper and I ask you, do you recognize your signature on this paper?

A I do.

Q Do you also recognize the signature of your daughter, Elizabeth Seeling, on this paper?

A I do.

Q This is an amended business certificate, is it not, sir, with respect to Joint Stock Traders?

A That's correct.

MR. FELDSHUH: I will offer it, sir, as Defendant's Exhibit P.

MR. PALWICK: No objection.

(Defendant's Exhibit P was received in evidence.)

MR. FELDSHUH: May I have half a minute, your Honor, to look over these papers?

THE COURT: All right.

(Pause)

MR. FELDSHUH: Your Honor, I have no further questions of this witness.

Thank you sir.

THE COURT: Mr. Palwick.

REDIRECT EXAMINATION

BY MR. PALWICK:

Q I show you Defendant's Exhibit L which designates you, among others, as a signatory on the Joint Stock Traders bank account --

MR. FELDSHUH: May I have that question, please?

MR. PALWICK: I withdraw that question.

Q I show you Defendant's Exhibit L which purports to be a power of attorney from various people to you, and I ask if you ever acted under the authority of thatpower of attorney.

MR. FELDSHUH: Objection. The issue is not whether he acted. The issue is did he have the power.

THE COURT: That is not the issue. The issue here is obviously whether he exercised it. The objection is overruled.

A I have no recollection of ever having acted.

Q I show you Defendant's Exhibit M which appoints William F. La Morte as nominee of the Joint Venturers and ask if that designation was ever amended or changed.

THE COURT: He has already testified to that.

A I have no recollection of it being changed until the agreement of 1964.

Q And who was the designee in 1964?

MR. FELDSHUH: In reference to a document not in evidence?

MR. PALWICK: I am not referring to any document necessarily.

THE COURT: He is not referring to any document.

The testimony was there was a reorganization of the partnership in 1964 and it became the Willard J. La Morte Partnership. That's already in evidence.

Q Who was designated as nominee under the Willard J. La Morte Partnership?

MR. FELDSHUH: If he knows. I object, your Honor.

THE COURT: You object?

MR. FELDSHUH: Yes.

THE COURT: You can recross examine him, if you want to.

Mr. Cameron, can you answer the question?

THE WITNESS: I don't understand Mr. Palwick's question.

Q William F. La Morte was named as nominee under the '59 agreement, is that correct?

A That is my best recollection.

Q Who was named under the 1964 agreement?

MR. FELDSHUH: Objection, your Honor. That assumes something that is not in evidence, that a nominee was designated. It's like the question, "When did you stop beating your wife?"

THE COURT: It is not exactly that, Mr. Feldshuh. The question is improper, Mr. Palwick.

Q Wasn't there a nominee designated under the 1964

agreement?

A I have no recollection without reading the agreement, but in fact Mr. Willard La Morte acted from then on.

MR. FELDSHUH: I move to strike the remainder of the answer. It is not responsive.

THE COURT: The motion is denied.

MR. PALWICK: No further redirect.

RECROSS EXAMINATION

BY MR. FELDSHUH:

Q Did Mr. La Morte ever tell you, now referring to Mr. Willard La Morte, that you cannot sign a check upon the partnership account?

A No.

Q Did he ever instruct you not to sign a check, sir?

A No.

MR. FELDSHUH: No further questions, your Honor.

THE COURT: All right, Mr. Cameron, thank you.

(Witness excused)

MR. PALWICK: Our next witness is John G. Russell.

J O H N G. R U S S E L L, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PALWICK:

Q What is your professional or business affiliation, Mr. Russell?

A I am an evaluation engineer by profession employed by the American Appraisal Company located in Milwaukee, Wisconsin.

Q Will you give us a brief resume of your education and experience from the college level on?

A I was graduated from the University of Missouri in February, 1950, with a degree in Mechanical Engineering, Bachelor of Science. I was employed three years by the State of Missouri in their Division of Public Buildings regarding supervising alterations and additions to public buildings.

Following that I was employed for ten years by Black & Veech, a consulting engineering firm in Kansas City. I was engaged in financial studies, rate studies and appraisals, and for the past nearly ten years I have been employed by the American Appraisal Company, all but one of those in the financial valuation division where we have been engaged in the valuation of capital stocks, business enterprise intangibles, various kinds of financial analysis relating to valuation.

I am a senior member of the American Society of Appraisers, a registered professional engineer in Missouri and Wisconsin and a member of the Milwaukee Investment Analysts Society.

Q Have you examined Plaintiff's Exhibits 13 and 14 which are the proxy statements dated November 5, 1965, and the Kuttner, Weiss & Berman certificate of results of Fireproof for the year ended December 31, 1965?

A Yes, I have.

Q As a result of the examination, have you arrived at a valuation for Fireproof shares of stock as of date of February 1, 1966?

A Yes, I have.

Q And what is that valuation?

A $100 per share.

Q How would you translate that into values per Shattuck Denn share that were exchanged for the Fireproof shares?

A I believe the ratio was 13.2 --

Q 13.2 to what?

A To 1. I will have to make that --

Q Would this help you (handing slide rule to the witness).

A Approximately $7.55 per share.

MR. PALWICK: Would your Honor like to have these exhibits in front of you while we go through this?

THE COURT: Yes.

(Documents handed to the Court.)

Q Now, will you tell us how you arrived at your conclusion?

A In valuing a business enterprise or 100 per cent of the stock of a corporation, there are a number of factors which must be considered. These include the history and nature of the business, the particular industry, the state of the general economy and the particular area in which the company is located, historical and prospective earnings, underlying assets and book value and the capitalization of prospective earnings into value. Multiples to be applied to earnings can be obtained in consideration of the ratios of market price to earnings and other indicators for companies in the same or similar line of business whose stock are publicly traded.

I gave all of these factors consideration in arriving at this value. I first reviewed the history and description of the company's business as set forth in the proxy statement dated November 5, 1965. Fireproof Products Company was first incorporated in New York in 1904 and in 1913 its name was changed to the Fireproof Products Company,

Inc. It is engaged in the distribution and sale of reinforcing materials, steel reinforcing bars and wire fabrication purchased from producing steel bars, bars being cut to specification and fabrication being distributed as received.

MR. FELDSHUH: Pardon me, Mr. Russell. Are you reading from any of the exhibits in evidence?

THE WITNESS: What I am reading from are certain notes made from, in this particular instance, the proxy statement.

MR. FELDSHUH: These are your notes, is that right, sir?

THE WITNESS: Yes. Some of them are verbatim from that proxy statement, a description of the company's business.

MR. FELDSHUH: Your Honor, could we have those notes marked for identification?

THE COURT: Yes.

(Defendant's Exhibit Q was marked for identification.

A The company also distributes metal floor forms, steel joists, supporting and forming accessories, expansion joints, steel roof decks and metal and wire devices used with wood forms in fireproof construction. It also performs

some fabricating operation, chiefly in cutting and bending reinforcing bars.

Through its wholly owned subsidiary, Steel Erecting Company, Inc., which was formed in 1965, Fireproof erects and installs roofs, floor deck and other products, including structural steel in certain instances.

Through another wholly owned subsidiary, Republic Fireproofing Company, Inc., which was acquired on April 2, 1962, Fireproof engineers and distributes a type of reinforced concrete floor and roof systems composed of flag blocks, concrete reinforcing bars and accessory items.

Reinforcing bars and welded wire fabric are used primarily in monolithic reinforced concrete structure.

So this company primarily serves the building industry and particularly reinforced concrete building construction. The major competitors are steel producers such as Bethlehem Steel, United States Steel, Republic Steel Corporation, Inland Steel. Fireproof purchases its purchases from some of these same companies.

Fireproof also merchandises metal wire and combined wire and lathe for plaster together with accessories such as channels, angles, tying devices.

The major competitors in the metal lathing field are the National Gypsum Company.

The company also supplied corrugated and flat steel forms for use in constructing concrete floors and roofs of steel frame structures as well as support ties, wire clips used in concrete fireproofing around structural steel members in buildings. The fireproof markets are largely in the metropolitan New York City area, as well as surrounding counties in New York and Connecticut and Northern New Jersey. The company sales organization comprised some twenty salesmen selling directly to concrete and general contractors, lathing contractors and road contractors, and these were supported by five product managers who provided technical assistance for the lines within their area.

Fireproof and its subsidiaries employed approximately 140 people comprising 80 salaried personnel and 60 hourly paid personnel. Its main offices, comprising 6,800 square feet and principal warehouse space comprising 33,000 square feet on the appraisal date were located at 138 Bruckner Boulevard in the Bronx and were leased at an annual rental of $32,000 for a lease term to expire in March, 1971.

There were approximately 175,000 square feet of storage and fabricating yards in the Bronx. This particular area was served by rail service and had good truck access.

The next step in the investigation, I visited the present offices and plant of Fireproof and discussed

operations as of February, 1966, and prior, with Mr. Ray Davies, president of Fireproof, and Mr. Joseph Castro, who is the treasurer.

I also obtained certain financial statements relating to the company's operations.

I next reviewed the sales and earnings of Fireproof Products for the period as set forth in the statements of the consolidated income for the years ended December 31, 1960 to 1964 and for the two six-month periods ending June 30, 1964 and 1965 as set forth in the aforementioned proxy statement.

I was also provided with a copy of the unconsolidated financial statement as of December 31, 1965, the other exhibit referred to, prepared by the company's certified public accountants.

In order to obtain the net income for 1965 on a base consistent with the consolidated statements, I also obtained the financial statements for Steel Erecting Company, Inc. and Republic Fireproofing Company, Inc. for the year 1965.

It is noted that the sales revenues are somewhat erratic.

MR. FELDSHUH: Somewhat what?

THE WITNESS: Erratic, cyclical.

MR. FELDSHUH: Your Honor, these records are characterizations or conclusions. I don't know that there is a proper foundation laid for the word "erratic."

THE COURT: It is commonly used. The man has been put on as an expert. Obviously he has to come to a conclusion. Objection overruled.

A The sales revenues fluctuated from a low of $11,987,000 in 1964 to a high of $14,526,000 in 1962. These sales revenues generally declined from that high of 1962 through 1964. It showed a slight upturn in 1965 totaling $12,554,000.

Net income as shown in the figures, consolidated figures, set forth in the proxy statement for 1960 was 55,500; 1961, 60,800; 1962, 96,800; 1963, 94,400; and in 1964, $173,800.

The figure for 1965 from the unconsolidated statement for Fireproof Products Company was $37,800. To that I added the net income of the aforementioned subsidiaries, Steel Erecting Company in the amount of $18,300, and Republic Fireproof Company, $17,900, for a total of $74,000, which is a figure comparable to the ones set forth in the consolidated statement.

It should be noted that the profitability of Fireproof Products is quite low. The net income as a

percentage of sales revenues ranges from a low of .3 of 1 per cent for 1965 to a high of 1.5 per cent for the company in 1964.

Due to the nature of this business, it being related to construction, which is a somewhat cyclical industry, and because of the fluctuating sales and income, an average or two or more years net income is more meaningful as an indication of the prospective earnings of this company than the income of any particular year.

MR. FELDSHUH: Would you keep your voice up just a bit?

THE WITNESS: All right.

A The significant averages for the period studied for profit are as follows:

The average for the years 1960 to 1964 was $96,200. The average for 1961 through 1965 was $100,000. And the average for 1964 and 1965 was $123,900.

I also reviewed the financial condition of Fireproof Products as set forth in the consolidated balance sheet as of December 31, 1964, which was shown in the proxy statement, and the unconsolidated balance sheet as of December 31, 1965, as set forth in the separate financial statement furnished.

The consolidated net worth at December 31, 1964

was $1,75[illegible],000 or $141.85 per share. The book net worth of the Fireproof Products Company not consolidated at December 31, 1965, was $1,709,000.

The unconsolidated company at December 31, 1965, had current assets of $4,393,000 and current liabilities of $2,611,000, the net working capital of $1,782,000. The current ratio, which is the ratio of current assets to current liabilities, was 2.83 and the turnover or working capital divided into sales was 7 times, and I concluded that working capital was adequate for operations at that time.

THE COURT: May I have that just again, please? I lost it.

THE WITNESS: I concluded that working capital was adequate at that time.

A Other assets as shown in the balance sheet are comprised of fixed assets of $309,000. I might mention that I am rounding these figures off to the nearest thousand dollars. And investments of $636,000. The net investment in subsidiaries and affiliates was $636,000 minus an indebtedness to a subsidiary taken of $226,000, leaving $410,000 as the net investment.

It should be noted that the return on investment for Fireproof not consolidated for 1965 was 2.2 per cent. The return on investment using the five-year average

profitability of approximately $100,000 would be slightly less than 6 per cent.

Having reviewed the history and description of the business and the financial statements of Fireproof, the next step in the evaluation is to translate these factors into value. In valuing the entire capital stock of a business enterprise, the principal measure of value is the present value of future earnings to be derived from the enterprise. In valuing an entire company, dividends are given little or no weight as the purchaser of the entire company can vary the dividends at will.

The selection of appropriate multiples of earnings to be applied in valuing this company can be based upon experience and judgment but it is helpful to analyze the multiples which the investment community applies to the companies engaged in similar lines of business whose stocks are publicly traded. A search of the various financial sources in this instance indicated that there were no companies available for analysis exactly similar to Fireproof Products, but there were several companies in related businesses, and I selected five companies as a guide in selecting the appropriate market ratio. These companies were Ceco Corporation, Belmont Iron Works, A. M. Castle & Company, Earl M. Jorgensen & Company and Morrison-Knudsen Company.

Ceco Corporation manufactures and distributes steel products including reinforcing bars, steel joists, shores and rip deck and other steel building material. It sells nationwide and has total sales of $117,000,000 in 1965.

Belmont Iron Works is engaged in design, fabrication and erection of structural steel for buildings and bridges, including the sale of products for installation abroad. The sales were 9.7 million in 1965.

A. M. Castle & Company is engaged in the distribution of steel and other products throughout the Middle West and Pacific Coast and on the East Coast. The 1965 sales were $64 million.

Earl M. Jorgensen Company is engaged in the warehousing and distribution of steel and aluminum products and also produces steel forgings. Its sales in 1965 were $94 million.

Morrison-Knudsen is a general contractor engaged in heavy or engineering type of construction whose 1965 sales were $167 million.

I have prepared a summary of the analysis of these comparative companies. It's included in the papers which were marked for an exhibit earlier. It shows, among other things, the ratio of the aggregate market price of the common shares at the end of January, 1966, to 1965 earnings,

the five-year average earnings and the average 1964 and 1965 earnings, and net worth.

The schedule is identified herein as Schedule 2.

THE COURT: Why don't we take a short recess.

(Recess)

A The ratios of aggregate market price of the common shares at the end of January, 1966, to 1965 earnings for these selected companies ranged from a low of 7.3 for Belmont Iron Works to 12 for Morrison-Knudsen Company and the average for the five was 10.1.

The ratios of market price to five-year average earnings ranged from a high of 19.1 for Castle to 12.9 for Morrison-Knudsen and the average was 15.8.

The ratio of market price of common shares to the average 1964 and 1965 earnings ranged from a low of 8.5 for Ceco Corporation to 12.8 for A.M. Castle and the average was 11.3.

As an indication of the growth in sales for these companies, I calculated the ratio of 1965 sales to 1961 sales, and for Ceco Corporation that average was 1.47, for Belmont it was .94, for Castle it was 1.8 and for Jorgensen 1.57, Morrison-Knudsen 1.29, indicating that all but one of these companies were exhibiting fair growth during this period.

And the net income in the five years for Ceco showed an increase of 90 per cent, for Castle 161 per cent, Jorgensen 181 per cent, Morrison-Knudsen was about the same.

These companies have generally shown growth in earnings over the period. When you have a situation where -- you will naturally have a situation where the 1965 earnings are considerably higher than the five-year average earnings, and therefore ratios of current market price of stock, if they average about 10 times for 1965 earnings, would average -- naturally average much higher for the five-year average, and in this case, as I said, that was 15.8 times. But in the case of these companies, current earnings are much more indicative of the potential earnings of the companies rather than the five-year average earnings.

I think in the case of Fireproof Products that is not true because of the fluctuation of earnings, and it is my opinion that as of that time the prospective earnings were more properly indicated as somewhere between the average of the 1965-1965 earnings and the five-year average earnings rather than the most recent year's earnings, which at that time was 1965, and the earnings were down. The 1964 earnings were abnormally high.

Based upon the analysis of the comparative

companies and the exercise of judgment, I concluded that the proper multiples to be applied to average 1964-1965 earnings for Fireproof and the five-year average earnings were 10 times. In my opinion at that time, it was not in a growth situation.

The indications of value are therefore 10 times the two-year average earnings of $123,900 or $1,239,000, and 10 times the five-year average earnings of 100,000 are $1 million. The average of those two figures is approximately 1,119,000, which for the 11,702 shares amounts tc approximately $95.60 per share.

In consideration of all of the relevant factors involved, I concluded that the fair market value of Fireproof Products' shares was $100 per share.

Q Did you take into consideration underlying book values?

A I did take that into consideration and I don't feel that the net worth as -- that the book net worth as stated is indicative of value of this company because the earnings were not sufficient to justify an investment of that amount of money.

MR. PALWICK: No further direct.

MR. FELDSHUH: Your Honor, may I suggest at this point that we adjourn for lunch. During that hour, if that

be your Honor's wish, I will devote myself to trying to absorb the information that this witness has given in order to prepare effectively my cross examination.

THE COURT: How many more witnesses will you have, Mr. Palwick?

MR. PALWICK: I am sorry.

THE COURT: How many more witnesses after Mr. Russell?

MR. PALWICK: I was told last night that Mr. Feldshun does not intend to call Mr. Willard La Morte --

MR. FELDSHUH: You were told what?

MR. PALWICK: That you did not intend to call --

MR. FELDSHUH: That is not so.

MR. PALWICK: It is so. If you do not intend to call Willard La Morte, I would like to call Willard La Morte as an adverse witness.

MR. FELDSHUH: I don't think I am called upon to make a decision as to that. The only area we are concerned with now, if it please the Court, is we are on plaintiff's case.

THE COURT: I am inclined to agree with that. I think, Mr. Palwick, you will have to make your own decision without regard to what the defendant may or may not do.

MR. PALWICK: Then I will call Mr. Willard

La Morte as an adverse witness.

THE COURT: I will adjourn. My only problem with it, Mr. Feldshuh, is that you have an expert witness and I was just looking at the time. If I am going to give you time for lunch to prepare, I will have to similarly do it with Mr. Palwick when you put your expert on, if he has some information like that. I am not sure I want to get myself in that position where I have to have that delay. I will risk it and we will adjourn until 1:30.

MR. FELDSHUH: Thank you very much, your Honor.

(Whereupon, a luncheon recess was taken until 1:30 p.m.)

- - - - -

AFTERNOON SESSION

1:35 P. M.

J O H N G. R U S S E L L, resumed.

CROSS EXAMINATION

BY MR. FELDSHUH:

Q Mr. Russell, your approach to the valuation of the Fireproof shares was based upon the method of price-earnings ratio, is that correct, sir?

A The price-earnings ratio as indicated by the publicly traded companies was one of the factors I considered in arriving at my multiple of 10 to apply to the prospective earnings of the company. I in a sense was capitalizing prospective earnings by a multiple of 10.

Q And that is how you arrived, did you not, sir, when you testified to his Honor that the two-year average of earnings multiplied by 10 came to $1,239,000, do you recall that, sir?

A Yes.

Q And that two years being 1964 and 1965?

A Right.

Q And you also testified, did you not, that with regard to the five-year average earnings, that you arrived on the multiple of 10 times earnings at $1 million, is that right, sir?

A That was the result of the calculation, right.

Q And then you took those two figures and you averaged them and you arrived at a figure of $1,119,000, is that right?

A Correct.

Q And you then divided that figure by 11,702 shares which was reported to you as the issued and outstanding shares as of December 31, 1965?

A Right.

Q Sir, with regard to that area, you did consider, did you not, Plaintiff's Exhibit 14 in evidence --

MR. FELDSHUH: May I have it?

A Is that the 1965 statement?

Q Yes, it is the 1965 report prepared by the certified public accountants. Do you have it, sir?

A Yes.

Q I take it, sir, you examined this report very carefully, did you not?

A Yes.

Q Did you see anything unusual about it, now referring to Plaintiff's Exhibit 14 in evidence?

A No, I didn't note anything unusual.

Q Sir, with regard to your procedures in valuing, how would you treat a non-recurring item? Does this

non-recurring item have a significant impact upon earnings?

A A non-recurring item can have a significant impact upon earnings.

Q It can have?

A It can have.

Q Sir, would you kindly look at Schedule 3 in Plaintiff's Exhibit 14 in evidence, please?

Sir, you see Schedule 3 as general and administrative expenses, is that right?

A Right.

Q Now, looking down that column, do you see a write-off "Bad debts, $92,101.53"?

A Yes.

Q As far as you are concerned, sir, isn't that a non-recurring item?

A No.

Q Did you examine the prior balance sheets to determine whether a bad debt of that magnitude had previously been written off?

A Yes, I did, and there were bad debts in excess of that written off in prior years.

Q Let's see. What prior years, sir? Would you say as of December 31, 1964?

A '64, '63, '62.

Q Would you show me, sir, where you got that information, '63, '62?

MR. FELDSHUH: I will withdraw that for a moment, your Honor.

Q Sir, I show you this paper and I ask you, sir, is this the financial statement of Kuttner, Weiss & Berman -- please look at it -- as of December 31, 1964?

MR. PALWICK: Objection. The witness is not competent to say what that document is. The document speaks for itself.

THE COURT: Objection sustained.

Q Mr. Russell, in examining your records you had opportunity to look, did you not, at the proxy statement, being Plaintiff's Exhibit 13 in evidence?

A Right.

Q Does the proxy statement, Plaintiff's Exhibit 13 in evidence, contain an operating statement of Fireproof for the periods 1965 back to 19 -- or 1964 back to 1960?

A Yes.

Q Would you look at it, please?

MR. PALWICK: Are you referring to page 15 now?

THE WITNESS: Yes.

MR. PALWICK: Are we referring to page 15 now?

MR. FELDSHUH: Yes, page 15.

Q Sir, you see the net income for 1964 reported there, do you not?

A Yes.

Q At $173,000?

A Right.

Q Now, if I told you, sir, that the financial report of Kuttner, Weiss & Berman for the period December 31, 1964, in Schedule 3 thereof, reports bad debts at $476.67 and, sir, assuming I told you that and you had knowledge that in Plaintiff's Exhibit 14 in evidence bad debts of $92,000, round figures, was written off, would that make a difference to you with regard to your evaluation of the Fireproof shares?

A Well, if I knew that $92,000 was abnormal to that degree in comparison to the $400-odd in 1964, I probably would have concluded that was abnormal.

Q Were you furnished with other than what appears in Plaintiff's Exhibit 13, namely, the proxy statement; were you furnished with the definitive report of the certified public accountants?

A As indicated in my earlier statement, when I visited the property to interview Mr. Davies, I was furnished with certain other financial statements.

Q I show you this paper and I ask you, sir, whether

or not you recognize this booklet to be one of the papers shown to you at the time of your visit. Would you look at it, please?

A Yes, I was furnished with a similar statement, with a copy of that statement.

MR. FELDSHUH: I will now offer it, your Honor.

MR. PALWICK: No objection.

THE COURT: Is that the statement for 1964?

MR. FELDSHUH: Yes, sir. This is a detailed financial report for 1964, your Honor.

(Defendant's Exhibit R was received in evidence.)

Q Now, looking at Schedule 3 in Defendant's Exhibit R, you see there, do you not, insofar as bad debts are alleged, $476.77. Do you see that, sir?

A Yes.

Q And you also know that as of December 31, 1965 the bad debt schedule or legend had an item of over $92,000?

A Yes.

Q Now, sir, having that in mind, isn't it customary to either eliminate or make some adjustment for a non-recurring expense item?

A It is, but there were some charges to bad debts made in every year for the period shown. In at least one

year substantially in excess of $92,000. But when you take the average of the two years, which is what I did, this levels out the effect of such an item of expense occurring in one of the years.

Q Sir, what I am asking you is when you arrived at that figure of $100 on a price-earnings ratio, did you consider the fact on your valuation for the year 1965 which you averaged with 1964 a bad debt of $92,000 as compared with $400 the year before?

A By averaging the two, the abnormality is washed out.

Q An abnormality between $400 and $92,000, you averaged those and the abnormality is wiped out; that is your testimony, sir?

A Right. Also --

THE COURT: Would you explain that to me, Mr. Russell? I don't understand your rationale for that. It seems to me a $92,000 bad debt which may be a non-recurring item and a $400 debt in another, that merely adding them together doesn't seem to me to come out with the elimination of the matter. I would appreciate an explanation of that.

THE WITNESS: Bad debts being charged as an operating expense or general administrative expense for Fireproof Products was not a non-recurring item.

There were some charges for bad debts in every year of the five-year period we are looking at, and they ranged from the low of $470-odd for 1964 to a high of -- I don't have the figure in front of me, but well over -- as I recall, well over $150,000 in one of the other years.

So I am not saying that -- I am not accepting that they are non-recurring, I am saying that they are items which appear in different degrees in each of those years and that when I average two years together, that I level out the effect of it.

THE COURT: That is an entirely different thing than you seemed to be saying. I now understand you. You are saying that bad debts appeared during the five-year period that you studied and even though between '64 and '65 there was an upand down, that over time by adding the two together you averaged it out and probably came up with the correct results taking it all into account?

THE WITNESS: I believe so.

THE COURT: Now I understand you.

MR. FELDSHUH: Thank you, sir.

BY MR. FELDSHUH:

Q Now, referring to Defendant's Exhibit Q for identification, sir, being the notes from which you read during your testimony, show me, sir, where anywhere --

MR. PALWICK: I object to that. He paraphrased his notes.

MR. FELDSHUH: I will accept that.

Q You paraphrased your notes. Tell me, sir, where in these notes, if at all, is one indication that there were prior bad debts taken off in the years '60, '61, '62, '63 in the magnitude of over $92,000.

A Nowhere in those figures is that clearly set out.

THE COURT: Mr. Feldshuh, I think that kind of question again is to me a waste of time. If you have possession of those items and if those bad debts did not occur, you are in the best position to indicate it and to show it. Mr. La Morte would have possession of them. There is no point in our going into the business with Mr. Russell on that.

MR. FELDSHUH: Only from the point of view of valuation, sir, and what an expert does.

THE COURT: I am prepared for you to go to the question of evaluation with him and to probe as far as you want to go, but if no item greater than that appears, you are in better position to know it and get those figures before the Court than Mr. Russell is. There is no point in asking him about it.

MR. FELDSHUH: All right, sir.

THE COURT: If he is wrong, then you can show it.

MR. FELDSHUH: My approach, your Honor, with all due deference, was to establish a procedure by an expert as to evaluations in the sense that --

THE COURT: I am prepared for you to do that and you are perfectly free to do it. My only quarrel at the moment with it is to ask this witness questions that you probably know more about in terms of getting the facts than he does.

MR. FELDSHUH: Very good. I see your point.

MR. PALWICK: There is a further objection. Mr. Feldshuh is trying to pin the witness down to what is contained in his notes. The witness is here testifying as a result of his own knowledge and his own recollection and he is just using the notes to refresh his recollection.

THE COURT: I don't know. I think that as I listened and saw the testimony of Mr. Russell, it did appear to me he was closely following his notes. He is an expert. He can answer any questions, and I am going to allow Mr. Feldshuh within reason to cross examine him.

Q Please tell me, sir, with regard to a non-recurring bad debt, if it appeared to you in your examination of financials of the subject company, what impact would you give to that?

A If an expense was actually non-recurring, I would eliminate it as an expense.

Q Now, if that were so with regard to Plaintiff's Exhibit 14 in evidence, namely, the 1965 report where $92,000 was involved and set out in Schedule 3, predicated upon your procedure as an expert you would eliminate that $92,000, is that right, sir?

A But I have already said I didn't think it was non-recurring and therefore --

Q Assuming it was, what would you do about it?

A I would give the same answer. If I know of a non-recurring expense, then the normal procedure is to eliminate it as an expense.

Q What would be the impact of the elimination of that expense upon the operating profit or net income for that particular year?

A Well, it would be approximately one-half of $92,000 or $46,000.

Q When you say "one-half," you have given it the after-tax impact, is that right, sir?

A Right.

Q But the before-tax income would be increased by $92,000?

A Correct.

Q Sir, in that circumstance, with regard to Plaintiff's Exhibit 13 in evidence, I take it, sir, that the net income for the year 1964 -- I am sorry -- it is not here. With regard to the net income for 1965, as you testified --

MR. FELDSHUH: I will withdraw the question, your Honor. I think your Honor has got it.

Q Mr. Russell, upon your occasion to visit at the plant or at Shattuck Denn, when did that visit take place?

(Pause)

Q Sir, could you give me the approximate date?

A I believe that was in February or March of 1972. I could check it more definitely.

Q That's all right, February or March of 1972 is fine.

Sir, at that time you spoke with Mr. Davies and Mr. Castro?

A That's correct.

Q And you discussed the posture of Fireproof as it existed in the years 1960 down to 1965?

A Correct.

Q In the course of that discussion, did you ever hear of the name of a company Byansel, one word, the B-y-a-n-s-e-l Company?

A No.

Q Never heard of that.

You have been engaged in your profession for a long period of time, as you have testified. In the course of your work and particularly in your professional associations, did you ever come across the name Duff, Anderson & Clark?

A I don't recall ever having done so, no.

Q The name means nothing to you?

A Nothing.

Q Did you ask Mr. Davies whether or not the directors of Shattuck Denn solicited a report immediately prior to the occasion of sending out the proxy statement from a professional company engaged in appraising securities and stocks with regard to Fireproof?

A No.

Q Sir, I show you this book and again I ask you, was it ever mentioned to you that on or about 1965, and particularly June 24, 1965, the board of directors of Shattuck Denn Mining Corporation were furnished with a report reviewing the proposed acquisition of Fireproof Products Company, Inc. by Shattuck Denn Mining Corporation?

MR. PALWICK: I object to the question. It assumes a fact not in evidence. Let him ask whether such a report was ever prepared.

MR. FELDSHUH: I am just asking if he was ever

told about any such report.

A No.

Q And I take it you were never told about Byansel Company as being a company involved in Fireproof?

A I was not.

Q Will you look at page 15 of Plaintiff's Exhibit 13 in evidence with regard to the net sales revenues and the net income? You saw, did you not, an extreme difference between the net income in 1960 and 1961 as compared with 1962?

A Yes.

Q When you saw that extreme difference, did you not ask Mr. Davies or Mr. Castro what is the basis for that difference?

A We discussed operations of the company in general.

Q Didn't you ask them whether or not --

MR. PALWICK: May he finish his answer? You interrupted the witness.

THE COURT: Mr. Feldshuh, allow him to finish.

MR. FELDSHUH: I beg your pardon. I thought he was finished.

A We discussed operations of the company in general, but I did not and normally would not ask such a question. I would make my own analysis of the various items of

expense, and if any particular one of those seemed questionable or unusual, then I might ask him about it.

Q Well, you knew about the Republic Company, didn't you, sir, as you testified?

A Yes.

Q Didn't it strike you that you should ask whether or not the Republic Company was consolidated with Fireproof from the point of view of reporting in the years '60 and '61?

A Well, Republic was acquired in 1962.

Q Right. So, therefore, the difference between '60 and '61 would arise by reason of the acquisition of another company, is that right, sir?

A It could have, but it so happened that Republic was never much of a contributor to earnings.

Q What other company was there that contributed?

A I did ask them about Republic and learned it was never a successful company.

Q But you did testify you examined the financial reports of Republic; do you remember that testimony, sir?

A I don't recall speaking to that particular question. I did -- I was furnished copies of Republic's financial statements and did examine them.

Q With regard to your procedures in evaluating and when you know that a company is reporting on a non-consolidated

basis in prior years and is then reporting on a consolidated basis, don't you take that factor into consideration?

A Oh, certainly, and I did.

Q And you did that in what respect, sir?

A In adjusting the 1965 statements, for which Fireproof Products was an unconsolidated statement. I added to it the income from the subsidiaries.

Q But you had never been told that Byansel had been a company that was liquidated into Fireproof in 1963?

A No.

Q That information wasn't furnished to you at all?

A No.

Q Therefore, sir, having that information and recognizing that it is now assuming on a consolidated basis, those swings in that income wouldn't be that great, would they?

A I don't know anything about Byansel.

Q Let's take Republic.

A What was it?

Q When you saw this difference between 60,000 net income in '61 and 96 in '62, weren't you obliged, knowing that '61 and '60 were years when Republic was not consolidated with Fireproof from the point of view of reporting, didn't you have to adjust for that factor?

A Well, that factor --

MR. PALWICK: I object to this line of questioning on the ground that on page 15 at the top it says "The following statements of consolidated income of Fireproof Products, Inc. and consolidated subsidiaries for the years ended December 31, 1960 to 1964, inclusive," and so forth.

So these figures in the proxy statement are actually consolidated statements.

MR. FELDSHUH: I agree that they may be reported here as consolidated statements, but the fact is that the witness testified that Republic wasn't consolidated until 1962. So I am just bringing that to the attention of the Court from the point of view of the weight.

THE WITNESS: It wasn't even owned in 1962.

THE COURT: The objection is not well taken. As I understand what Mr. Feldshuh is attempting to do is to question the method employed by Mr. Russell in arriving at his various conclusions, and at this point one of the conclusions on which he based his evaluation -- at least one of the considerations -- was the wide fluctuation in the net earnings.

The question, I gather, is to attempt to determine whether he took into account the subsidiary companies which were consolidated after 1961.

All right. The objection is overruled.

Q Sir, you testified --

MR. FELDSHUH: I will go off on another subject, your Honor.

Q You testified that Steel Erecting Company was consolidated in 1965. Do you recall that testimony, sir?

A Yes. I was informed that Steel Erecting was created in 1965.

Q Were you ever informed that there had been a prior Steel Erecting Company?

A I was not informed that there had been a prior Steel Erecting Company. I understood that the same functions that were henceforth carried on by Steel Erecting Company had been carried on before by Fireproof Products but not as a separate subsidiary.

Q I see. And if information to the contrary were furnished to you, that might make a difference in your evaluation, would it not, sir?

A It could.

Q And you would have to go through a procedure, I am sure, which is professionally recognized of getting up what we call a pro forma, recognizing either the existence or non-existence of this affiliate or consolidated company?

A Perhaps. But the impact of Steel Erecting Company

was very minimal on the entire operation.

Q When you say "minimal," what do you mean by that, sir?

A I mean that it was not a major factor in arriving at the value of Fireproof Products.

Q I am a little bit at a loss as to how you can arrive at that conclusion when the revenue and sales throughout this period are pretty much the same and yet the net income is so vastly different. That is still your conclusion, is that right, sir, even though the revenue is pretty much the same? Very well.

Now, sir, upon your occasion of visiting Mr. Davies and Mr. Castro in 1972, you visited them at a modern building, did you not, up in the Bronx? Do you recall that, sir?

A Yes.

Q Were you told that the land upon which this building was standing was owned by Fireproof in 1964?

A Yes, I believe I was aware of that.

Q And, sir, being aware of that, at that time were you told it was vacant land without a building? Is that right?

A As I recall, I was told that, yes.

Q So that factually, sir, this was a non-operating asset, is that right?

A Right.

Q And it was not contributing to earnings, is that right?

A Not at the moment.

Q How would you treat it from the point of view of using the price-earnings ratio to evaluate that asset?

A As I recall, it was the intention of the company to move out of its all or then present quarters and construct a new building on that property.

Q Yes?

A But when they did accomplish that, that did not mean that the earnings and sales of the company were going to immediately increase because of that factor.

Q I didn't think I asked you that, sir. I asked you, given an asset which is non-operating and when you come to value Fireproof shares, didn't you inquire what the cost of this property was, at least?

A If it is strictly a non-operating asset and can be disposed of with no present or future effect upon the company, no other factors involved, it can be considered as a non-operating asset and added to a value determined by earnings, but that was not the case in this instance because they intended to use it in operations. They just hadn't done it yet.

Q Does that mean that because they hadn't done it yet by 1965 that you just ignored it? Is that it?

A I was making an evaluation based upon prospective earnings.

Q They didn't tell you that the property cost $200,000, did they, sir?

A I may have seen that or -- they may have told me that. I would have to see my notes.

Q They didn't tell you there was an appraised value on that property around June, 1965, and December 31, 1964, of $475,000; they didn't tell you that, did they, sir?

A I don't believe so.

Q Sir, are you familiar with a treatise called Valuing a Company written by George D. McCarthy, CPA, retired partner, Price, Waterhouse & Company, and Robert E. Healy, CPA, partner, Price, Waterhouse & Company? Are you familiar with this treatise?

A No, I am not.

Q You have never seen it before?

A I may have seen it but I have never read it. I don't recall having seen it. Is that the one written in connection with the Canadian --

Q No, it has nothing to do with Canada, as far as I know. I have read it and it has nothing to do with Canada.

A No, I have not read it nor have I seen it.

Q You have had no occasion to read it?

A No.

Q Therefore, I take it even though you didn't read it, would you recognize this as a recognized treatise from the point of view of valuing a company?

MR. PALWICK: Objection. It calls for a conclusion without any basis in fact. The witness hasn't read the book. How could he know whether it is an authoratative treatise?

THE COURT: You have presented him as an expert in the field. I would assume if he is an expert and this is an expert document of experts, he might have some knowledge of it. If he doesn't, he can say "No." He can answer.

Q Sir, if I told you at page 117 of this book the following appears:

"Unquestionably, non-operating assets should be revalued at their current market prices, but the figure thus obtained less any potential capital gains tax liability should be added to the value determined for the operating assets and business."

would you say, sir, that this is an improper procedure for evaluating the non-operating vacant land of Fireproof as the same existed in 1964 and 1965?

A Well, I think that statement is generally true,

but in applying it to any particular instance it may not be true.

Q Well, I have applied it just now to Fireproof.

A And I have said that I didn't agree that this land was purely a non-operating asset, that it was going to be the site of operations. It could not be sold and income obtained by the company because they would have to go and acquire other land for their plant purposes.

Q Sir, assuming that it were a non-operating asset, what difference would that make in your evaluations? Assuming that, sir, and assuming, as you testified, you believe this statement is true. You used the slide rule before. And assume further I told you there was an appraisal of the market value of this land for the period December, 1964, into 1965 of $475,000. What difference would that make to you in what you would do with that?

A In your hypothetical situation, we have a non-operating asset worth $400,000?

Q $475,000 appraised value and reported to be market value.

A The buyer of all of the capital stock of Fireproof Products would not be apt to pay that amount in addition to the amount indicated by the capitalization of earnings unless he would then be able to dispose of the property for that amount or unless it were going to form some part

of the operations which would contribute to the enterprise earnings which would support that amount of money for it.

Q You did testify that this very piece of land was subsequently used to put a building on where Fireproof and Shattuck and all of its affiliated companies operated?

A The property they were then in, I was told, was very old.

Q Do I understand this would have no impact on your price-earnings ratio as you found it to be, $100?

A That is correct, it does not have.

Q It would have no impact at all? In other words, you discard this entirely?

A I have explained why I did not include it as an added amount.

Q However, when Shattuck Denn acquired the Fireproof stock, that asset moved into Shattuck, did it not?

A Correct.

Q Sir, with regard to the element of control, you understood, did you not, that upon the completion of this merger that there would be a delivery of control of Fireproof to Shattuck, is that right, sir?

A I knew that 100 per cent of the stock and ownership in Fireproof was involved.

Q Were you informed by Mr. Davies that upon the

occasion of this merger that the stock position of the La Mortes was to the extent of 64.2 per cent of all the issued and outstanding stock of Fireproof?

A I don't recall being apprised of that.

Q Well, assuming that were so, would you give any weight to that factor in determining the value of those Fireproof shares, that 64.2 per cent?

A It would have made no difference. There would be no difference between 64 per cent and 100 per cent.

Q Would you contribute or allocate to control, to that factor, any increment at all?

A To control?

Q Yes.

A As compared to a minority --

Q Stock which is a minority interest.

A As compared to a minority interest?

Q Yes.

A One must recognize a difference.

Q Now, to what extent would you in your professional capacity recognize such a difference?

A Well, it would depend upon -- entirely upon the situation, what was being valued, what the interest was.

Q All right. Let us take this $100 that you claim was predicated upon the price-earnings ratio. How much of

an increment would you add to that $100 with respect to control?

A I wouldn't add anything to it because that figure does recognize that what is being valued is a controlling interest.

Q I am lost. See if you can help me out, please. You testified a moment ago that control is a factor to be given weight in determining value or estimating value of a security, is that right, sir?

A Relative to a block which is a minority interest.

Q Right. Now, in this particular situation you understand that by reason of this merger control would pass to Shattuck Denn, right?

A Right.

Q Now, going back again, sir, in the price-earnings ratio, you gave no weight to any factor of control, is that correct, sir?

A No, that is not correct. I did not apply price-earnings ratios derived strictly mathematically from the ratios of the companies that I selected for analysis. I looked at the ratios resulting from their stock prices, but I arrived in my own judgment as to what multiple should be applied to the prospective earnings of Fireproof in valuing the capital stock of Fireproof.

Q Isn't it customary in a situation where control passes out to an acquired company to put a premium upon the stock, the value of the stock, that is being delivered? Isn't that customary?

A It depends on what you are applying the premium to.

Q It is customary, is it not, sir, to arrive at a certain value and then to come to the control factor and say, "I increased the value of this share by 20 per cent or 25 per cent by reason of the control factor"? Isn't that a customary procedure followed by you gentlemen?

A I wouldn't say it was customary. It is sometimes done that way but not always.

Q However, you do agree that in this situation control was passed of Fireproof to Shattuck?

A Yes.

THE COURT: Let me see if I understand it, Mr. Russell.

Is it the fact that you were not -- strike that.

The fact that in your evaluation of $100 that you did in fact consider control passing because 100 per cent of the stock of Fireproof was passing to Shattuck?

THE WITNESS: Well --

THE COURT: And therefore you didn't have to take into account whether somebody owned 64 per cent or 30 per

cent or 20 per cent?

THE WITNESS: The thing that I was valuing was -- I was valuing the entire company. I knew that a controlling interest was involved and the figure I arrived at per share of stock could be applied to any number of shares which would be controlling shares. But I did not arrive at my conclusion by considering price-earnings ratios applicable to minority shares, come up with a figure and then applying a premium to that to arrive at a controlling interest share.

I went directly to the entire enterprise concept.

THE COURT: In other words, you did apply whatever premium is applicable in terms of value to controlling shares, you applied it at least sub silentio?

THE WITNESS: I recognized it in my valuation, recognized that it was controlling interest. If you were going to value a minority interest, you would go the other way and it would be less than $100.

THE COURT: I see.

BY MR. FELDSHUH:

Q Were you informed, Mr. Russell, that with regard to this merger situation a letter went out to all the stockholders of Fireproof to the effect that if they disagreed with the proposal they would have a right of appraisal?

MR. PALWICK: I object. It is irrelevant.

MR. FELDSHUH: Was that told to you?

THE COURT: What is the relevance of that, Mr. Feldshuh?

MR. FELDSHUH: Just one second, sir. Will you take it subject to connection? My next question will positively show the relevance.

THE COURT: All right.

A I don't recall that I was told that.

Q Were you told that some of the stockholders did object to the merger and they sought appraisal?

MR. PALWICK: Objection. I think it is irrelevant. Any answer to that question would only involve hearsay anyway as to what a stockholder thought or didn't think about a proper evaluation.

THE COURT: Well, I think that we are talking now in regard to various things that were told to him in any event in questioning at his equation. Objection overruled.

MR. FELDSHUH: This is the final question on this subject.

THE COURT: I am allowing you to ask the question.

MR. FELDSHUH: I am sorry, sir.

A No, I wasn't told that. I didn't inquire about that because it was not important to my valuation.

Q Now, sir, in Plaintiff's Exhibit 14 in evidence, you noted, did you not, that the number of issued and outstanding shares as of December 31, 1965 were 11,702 and you so testified, as I recall?

A Correct.

Q Did you note, sir, that as of December 31, 1964 that the issued and outstanding shares -- would you look at page F-10 in Plaintiff's Exhibit 13 in evidence -- that the capital stock issued and outstanding as of December 31, 1964 was 12,395 shares, a reduction of some round figures, 700 shares?

Did you take that into consideration when you testified first as to the difference between the net worth of 1,758,000 as the same existed on December 31, 1964, and 1,700,000 as the same was reported on December 31, 1965?

MR. PALWICK: May I have that question re-read, please?

(Question read)

MR. PALWICK: I object to the question on the ground it improperly summarizes the witness' prior testimony.

THE COURT: Well, I think -- well, the only fault I find with the question as I heard it is that you said that there was 600 shares eliminated.

MR. FELDSHUH: That's right. There is the proof

of it. I also recall, your Honor, and I think my recollection is correct, that during his direct testimony he said 1 million 758 as against 1 million 700.

THE COURT: This is 1964 and this is 1965?

MR. FELDSHUH: Right, sir.

THE COURT: Objection overruled.

Q Sir, didn't you note that reduction in the issued and outstanding shares?

A Yes.

Q Did you ask for information to account for the reduction of those rounded figures, 700 shares?

A No.

Q Does that fact that there was this difference of merely $58,000, actually not even 58, some $40,000 in the respective net worth between '64 and '65, didn't that strike you as a factor to be compared with the reduced number of shares issued and outstanding?

A Well, when I quoted the figure of $141.85 per share I was merely dividing the net worth per the balance sheet by the number of shares then outstanding, 12,395, and in the next instance I used the number of shares outstanding at that time. Neither one of those was critical to my evaluation, though.

Q I am sorry, sir?

A But neither figure was critical to my valuation, though. When I arrived at my conclusion of the value, I used the 11,702 shares, which I understood were the number of shares outstanding at the appraisal date.

Q If you were told, sir, that 700 shares were turned in under the appraisal statute by stockholders who were in disagreement with this merger, would that indicate to you a minority interest vis-a-vis a majority interest?

MR. PALWICK: Objection to the question. It calls for hearsay testimony.

THE COURT: Objection overruled.

A You asked would that indicate to me a majority as compared to a minority?

Q A minority interest vis-a-vis a majority interest insofar as control is concerned.

A No, I don't believe that fact --

Q You wouldn't consider that factor at all?

A I wouldn't. Not in the approach that I used, no.

Q Not at all in your approach which was the price-earnings ratio approach?

A My approach was the valuation of prospective earnings by the application of what in my view was an appropriate multiple to convert the prospective earnings into value.

Now, you say that to differentiate from a strict formula price-earings ratio approach.

Q Sir, then it is the fact that with regard certainly to the control factor, with regard to a non-recurring bad debt factor and with regard to a non-operating asset, insofar as they might have had an impact upon your valuation you didn't give them any such weight in testifying with respect to the $100 per share?

A Well, in answer to that question I must say again, as I did before, that I did take all of those factors into consideration in arriving at my value.

Q You did?

A I did.

Q To what extent?

THE COURT: You have already gone into that.

MR. FELDSHUH: Sorry, sir?

THE COURT: I think he has answered that question before. You ha' now lumped them all together. He has answered that question as to each item before.

MR. FELDSHUH: Very well, sir. I have no further questions, your Honor.

Thank you very much.

THE COURT: Mr. Palwick.

REDIRECT EXAMINATION

BY MR. PALWICK:

Q Have you ever had experience, Mr. Russell, in selling a control block of shares in a traded stock?

A In selling a control block of shares?

Q Yes.

A No.

Q Have you ever had experience in buying a control block of shares?

A No.

MR. PALWICK: No further redirect.

MR. FELDSHUH: No further questions.

THE COURT: Mr. Russell, what is the value of this -- if you take into account what was paid for the Fireproof shares in the transaction, that is, a certain amount of, as I understand it, Shattuck stock, using that figure, what do you arrive at then as to the value of the Fireproof shares?

THE WITNESS: Well, approaching it in that way you would multiply whatever that figure was for Shattuck Denn stock by 13.21.

THE COURT: 13.21?

THE WITNESS: I believe was the stated ratio. 13.21.

THE COURT: 13.21 shares of Shattuck for every share of Fireproof, is that how it went, or the other way around?

THE WITNESS: Yes.

MR. PALWICK: It has been stipulated that the market value for Shattuck on February 1, 1966 was $8.75.

THE COURT: That answers my question. Thank you.

(Witness excused.)

MR. PALWICK: I would like to call Willard La Morte as an adverse witness, please.

W I L L A R D J. L A M O R T E, called as an adverse witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PALWICK:

Q I show you Plaintiff's Exhibit 10 in evidence. Did you sign that document and file it with the SEC?

A Yes, sir.

Q Now, this refers to certain partnerships and trading in those partnership accounts. Will you tell me what partnership accounts were involved, please?

A Willard J. La Mort Agent, Willard J. La Morte Partnership, Joint Stock Traders, Sanford Boulevard Venture. Those are the partnerships that are on here, sir.

Q Now, who were fellow partners in the Willard J. La Morte Agent partnership?

A My wife and children, sir.

Q Anyone else?

A Not to my recollection.

Q When did that partnership commence existence?

A About 1950 or early 1950's.

Q Is it still in existence?

A Yes.

Q Willard J. La Morte Partnership, who are your fellow partners?

A Over what period of time, sir?

Q Let's take from 1963 to 1967.

A Well, in 1964 a new partnership was formed known as Willard J. La Morte Partnership, of which it was my father, William F. La Morte, my brother Richard, my brother Howard, myself, Robert MacLeay and Elizabeth Seeling.

Q Is that partnership still in existence?

A Yes, sir.

Q Who are your fellow partners in Joint Stock Traders?

A During what period, sir?

Q Let me withdraw the question.

When was Joint Stock Traders formed?

A I don't recall but there is previous testimony here.

Q Was it the year 1959? Does that refresh your recollection?

A Yes, that seems familiar.

Q Is that your best recollection, that that was the year Joint Stock Traders commenced action?

A I believe there was a prior Joint Stock Traders before that.

Q But there was a Joint Stock Traders that started in 1959?

A Yes, sir.

Q Is that still in existence?

A No.

Q When did it go out of business?

A Let's see. It was merged into the Willard J. La Morte Partnership in June of '64, to the best of my recollection.

Q Who are your fellow partners?

A Could I see the exhibit, sir?

Q You can see anything you like. I think they were on exhibits offered by your counsel.

A Right, sir.

MR. FELDSHUH: Is that Joint Stock Traders?

MR. PALWICK: Yes.

(Documents handed to the witness)

A Now would you voice the question again, sir?

MR. PALWICK: Read the question back, please.

(Question read.)

A Is that in the Joint Stock Traders?

Q Yes.

A This Exhibit 0 indicates William F. La Morte, Willard J. La Morte, Howard W. La Morte, Richard P. La Morte, Dugald J. Cameron, Grace M. Lyons. That is dated in 1959, sir.

Q Who is Grace Lyons?

A My sister.

Q Let's take the Sanford Boulevard Venture. When was that formed?

THE WITNESS: Do we have any papers on that, Mr. Feldshuh?

MR. FELDSHUH: Nothing on Sanford.

A Sanford Boulevard Venture, going back purely from recollection, I believe commenced doing business in 1955.

Q Is it still in existence?

A Sanford Boulevard Venture. Here, too, that went into -- the assets went into the Willard J. La Morte

Partnership.

A Was that 1964?

A 1964. There seems to be just a little confusion there. I believe for income tax purposes statements were prepared on Sanford Boulevard Venture but for record keeping it was kept in the name of Willard J. La Morte Partnership.

Q To this date?

A And the same Willard J. La Morte Partnership with the possible changes in '64 is a continuation of an original Willard J. La Morte which did the bookkeeping on Sanford Boulevard properties.

Q Are you still filing separate income tax returns for Sanford Boulevard Venture?

A No.

Q When did you stop that?

A I believe the last one filed there was in 1964.

Q Now let's consider the Willard J. La Morte Agent account during the period from 1963 to 1967.

A Yes, sir.

Q Did that trade in stocks?

A Yes, sir.

Q What stocks were traded?

A Oh, many securities, sir.

Q Did it trade in Shattuck Denn?

A Between 1963 and 1967?

Q Yes.

A I believe there were small purchases there, insignificant purchases. However, there were quite a few sales.

Q Now, how did you account to the other partners? Did you furnish them an account of each sale, for example, or did you give them an end of year statement or did you account at all?

MR. FELDSHUH: Which one is this?

MR. PALWICK: The Agent account.

A Each partner received year end figures on the activities of the Agent account, sir.

Q Did those year end figures include a detailed account of each transaction?

A Yes, sir.

Q 100 shares of a particular stock were bought on a certain date and sold on a certain date and the net profit on that trade and that sort of thing?

A Yes, sir.

Q All right. Were any other accounts rendered to partners?

A Profit and loss statement, their percentage of the account, the inventory schedules.

Q Were any profits distributed with respect to those years and for that account?

A I just couldn't answer that, sir, without having a copy of the figures.

Q What is your best recollection; that the proceeds were reinvested or there is an annual distribution or some other periodic distribution?

A I can answer to the effect that there was not an annual distribution to all the partners other than the fact that any profits that were generated or any losses, their capital accounts would reflect the gain or loss, depending on the profit and loss in the partnership.

Q So that no cash, Mr. La Morte, was distributed during that period?

A I can't say that. If a partner might have required cash, he might have taken out cash or received cash.

Q Now, you say your wife and children were members of the partnership in addition to yourself?

A Yes, sir.

Q How many children do you have, sir?

A Seven, sir.

Q What were their ages at, let's say, the beginning of 1963?

A Well, the oldest right now is thirty, just turned

thirty. So they would be from twenty on down, and the youngest was one year old.

Q Who made the investment decisions with respect to that Agent account?

A I would say that I made those decisions primarily.

Q And who was authorized to sign the bank account?

A At what time, sir?

Q 1963 to 1967.

A At that time I believe it was just my wife and I.

Q Let's take the Willard J. La Morte Partnership again from 1963 to 1967. What was the practice with respect to accounting to your partners?

A Well, the partnership was different in that all of the members were -- we didn't have any minors in that partnership and I would prepare quarterly figures and mail them to all of the partners. The auditor would prepare an annual set of figures and he would, I believe, furnish them directly to the individuals involved so that they had a complete report.

Q Now, again, on quarterly figures, did you provide a statement of each trade for the account or did you give summary figures?

A I don't believe it was each individual trade. I think it was the summary figures.

Q So that actually it would be just a P & L statement and a balance sheet?

A It would be a complete capital balance sheet, profit and loss statement.

Q And how about the annual figures, were they in similar form?

A No, sir, they were in detail.

Q How much detail?

A Well, for example, inventory, every security would be listed and its cost, any other asset would be listed and its cost, every transaction that took place in the partnership would be listed, all the profits or gains would be listed as far as short term, long term. All the expenses would be itemized.

Q What was your practice between 1963 and 1964 with respect to the partnership? Was any cash distributed?

A Yes. I don't know the exact amounts but I do know that on the partnership that there was cash distributed in proportion to the individual's interests.

Q Somewhat similar to a dividend in the case of a corporation?

MR. FELDSHUH: Objection. It calls for a conclusion.

THE COURT: Objection sustained.

Q On what basis was the distribution made to each partner?

A Well, to make it real simple, if there were four partners and they each had 25 per cent and there was $10,000 to be distributed, everybody would get a quarter of it.

Q So it was on a pro rata basis on the amount of capital each partner had in the firm?

A Yes, sir.

Q In how many years did these distributions take place between '63 and '67?

A To the best of my recollection, there were distributions made so that the final distribution to all the partners gave back every penny that they have invested into the partnerships.

Q How much in dollar value was distributed over this period and in each year, if you know?

A I don't know, sir.

Q Can you estimate the total dollar value?

MR. FELDSHUH: The witness has said he doesn't know, your Honor. The question is asking him to speculate and guess.

MR. PALWICK: I am entitled to cross examine this witness to the extent of his recollection.

THE COURT: Objection overruled.

A I just have no way of knowing, sir.

Q In the range of $1 million?

A Oh, no.

Q Let us have your best estimate within whatever ranges you chose to estimate as to how much was expended.

A Well, as I recall, we started with a capital of somewhere in the neighborhood of about $300,000, so I would say that $300,000 was distributed to all the partners.

Q Now, who made the investment decisions with respect to the Partnership?

A It all depends what was involved, sir. If it was something unusual, the partners would meet and consider it.

Q What would be such an unusual investment as would require that kind of meeting?

A Well, there was one time when the partnership considered buying property, real estate, and developing it or selling it, and that was not in the normal routine of the way the partnerships were running.

Q What was the normal routine in which the partnerships were running?

A Well, way back -- it is the only way I know --

Q Let's take '63 to '67.

A Well, '63 to '67, the normal routine was a continuation of the procedure that was followed previously.

Q What was the procedure in effect on January 1, 1963?

MR. FELDSHUH: January --

MR. PALWICK: January 1, 1963.

A The partnerships subscribed to several market letters and analytical reports and in 1963 the various recommendations of these services would be studied primarily by myself and using Standard & Poor's history of the corporations an investment judgment would be made whether they were good or bad.

Q Who would make that judgment?

A I would make it in '63.

Q In '64?

A The reason I am hesitant, I am not too sure about '63, but as each year progressed I would make more and more of the investment decisions pertaining to securities.

Q And that is both on the buy and sell side, is that correct?

A Yes, sir.

Q Now, let's take the Joint Stock Traders account.

A Yes, sir.

Q That went from 1959 to 1964, I believe you said?

A I also said there was a Joint Stock Traders before that time, too, sir.

Q Let's take the period 1963 to whatever time in 1964 this account was folded into the partnership.

What accounts were furnished to the partners during that period?

A Well, I was not active in that particular one, sir. I believe that was handled by my father, and I also think there was somebody at Fireproof Products that I think compiled the figures on that.

Q You are quite sure that your father handled the account in 1963 and 1964?

A I can't --

Q If it would refresh your recollection, you are perfectly free to use those papers.

A I don't have anything that would. To the best of my knowledge, I was not active to any degree in the Joint Stock Traders account as far as trading in securities, although I cannot be certain of that.

Q How could you be certain of that?

A I have no way at this moment of knowing.

Q Do you have records at home or in your office which will make you certain?

A I don't believe that I kept the records on Joint Stock Traders. That is why I am hesitant on this.

Q Joint Stock Traders did buy and sell Shattuck Denn

stock during the period 1963 to 1967, did it not?

MR. FELDSHUH: It didn't exist after June 30, 1964.

MR. PALWICK: I will limit it to 1964.

A These records, which is Exhibit 10, I believe, indicate that there were disposition of some Shattuck shares in '64, sir.

Q Is it your recollection that these dispositions were made by William La Morte without consultation with you?

A I don't think that would be the true picture, sir. I don't think he would have, although I am not certain. I don't think he would have made these '64.

Q What do you think would be the true picture?

MR. FELDSHUH: Objection, your Honor. The witness says he can't answer that question, he has no recollection. He is asking for his thinking, what he would speculate would happen instead of what did happen.

THE COURT: I think he is entitled to probe the witness' recollection as much as possible. Objection overruled.

A I don't believe that my father would have engaged in transactions in Shattuck Denn without talking to me.

Q Do you have any independent recollection that he did talk to you about these trades in 1964?

A No, I don't, sir.

THE COURT: We will take a short break.

(Recess.)

BY MR. PALWICK:

Q Now, you mentioned the Sanford Boulevard Venture which existed from 1955 to 1964. What kind of reports were issued to the partners of that venture?

A To the best of my recollection, the financial figures of the Sanford Boulevard Venture were actually the Willard J. La Morte Partnership at that time.

Q At what time? We are talking about 1963 to 1964. Do you mean during that entire period?

A Yes, sir. Quarterly reports would go out to the individuals -- well, that's not quite true, because where Mr. Cameron might have a nominee, any reports would be sent to Mr. Cameron, not directly to the listed partner, and then, of course, at the annual year end when the auditors would make up the financial figures, that would go to all the partners.

Q I believe you were here earlier when Mr. Cameron testified that he received no reports except the annual reports?

A Yes, I was here, sir.

Q Does that refresh your recollection as to which reports were sent out?

A My recollection is that every quarter a report would go to all the partners.

Q I believe you testified that with respect to the partnership at the end of the year a report went out listing all transactions and giving a complete inventory of what was owned by the partnership, is that correct?

A Yes, [illegible].

MR. PALWICK: May I have this marked for identification?

(Plaintiff's Exhibit 15 marked for identification.)

Q I believe you testified that that annual report was prepared by the accountants, did you not?

A Yes, sir.

Q I show you Plaintiff's Exhibit 15 for identification and ask if you can tell us what this document is.

A That's the report that was received from Weiss, [illegible] & Sessler having to do with the Willard J. La Morte Partnership for the year ending December 31, 1966.

Q And that is the report that was distributed to the partners, is that not correct?

A This I know was. The only hesitancy I have on this is whether I also furnished a breakdown of the investments which would show all of our assets.

Q And would you also have furnished a list of all the transactions which resulted in the inventorying of those assets?

A No, sir, I would not. The accountants would do that for the income tax purposes.

Q A list of all transactions?

A Yes, sir, to the individuals.

MR. PALWICK: I offer this in evidence as the report that went to the partners for the year ended 1966.

MR. FELDSHUH: No objection.

(Plaintiff's Exhibit 15 for identification was received in evidence.)

MR. PALWICK: I note there is no list of assets or transactions.

Q Is that correct, Mr. La Morte?

A That's correct.

Q Now, did these partnerships, and I will treat them as one group unless you tell me at a given time there are differences, did these partnerships deal through brokers?

A On security transactions, yes, sir.

Q In whose name were the accounts?

MR. FELDSHUH: Would you take each partnership, please?

Q Generally speaking, in whose name were the accounts?

Were they carried in a separate partnership account for each partnership, were they carried in a man's name; how were they carried?

A There was an account known as William F. La Morte Special.

Q And who had authority to deal in that account?

A William F. La Morte, and I am just trying to think whether I was also able to trade in that account. At one time I believe I became able to trade in that account. And then I believe the balance were in the name of Willard J. La Morte.

Q Were all of the securities in these partnerships carried in street name to the extent that there were buys and sells on the exchanges?

A I just couldn't be sure of that.

Q Generally speaking, is that true?

A Well, I am not familiar with the ~~intricacies~~ of the brokerage business, but I imagine if a buy was put in for 100 shares of AT&T, as an illustration, at Schweickart & Company, I believe they would not transfer it to the name of the account. I believe they would probably keep it in their own name.

Q And this was the general procedure with respect to these partnerships, wasn't it?

A Yes, sir.

Q Now, when it came time to elect directors of the various corporations represented by the stock which you held, who authorized the issuance of a proxy to a brokerage firm?

MR. FELDSHUH: May I have that question, please?

(Question read)

A Under normal conditions, if I received the request for a proxy, barring any contests or anything like that, I would just normally sign it and send it in or neglect to send it in.

Q So that that was basically your responsibility?

A Yes, sir.

MR. FELDSHUH: I don't think that's what he said. He just said what he did.

MR. PALWICK: I asked him a question and he agreed that that was.

MR. FELDSHUH: Your Honor, he asked for responsibility as distinct from what he did.

MR. PALWICK: Read the question back, and the answer.

THE COURT: Mr. Feldshuh, Mr. La Morte has answered the question and if there is anything that needs to be clarified, you clarify it when you examine him.

Let's continue.

Q On the Fireproof merger certain shares of stock were issued to you, is that correct?

A Yes, sir.

Q Do you recall the number of shares?

A 19,101.

Q And what happened to those shares?

A I retained them until January of 1972, when I sold them.

Q You retained them in your possession?

A Oh, that I don't know, sir. They could have been in banks, they could have been in brokerage firms, they could have been any place.

Q Incidentally, in these brokerage accounts that you maintained for partnerships, were they margin accounts?

MR. FELDSHUH: Your Honor, I don't know what that has to do with anything involving the issues in this case.

THE COURT: What does that have to do with the issues in this case?

MR. PALWICK: I am about to show Mr. La Morte felt free to pledge shares held by the family at any time that he wanted and that he dealt with these assets generally as the owner and that therefore under 16(b) he is liable for the full share of the profits.

THE COURT: All right, the question may be answered.

A Would you repeat the question?

MR. PALWICK: Would the reporter read back the question, please?

(Question read)

A Yes, sir.

Q Now, did your wife receive shares on the Fireproof merger?

A Yes, sir.

Q How many shares did she receive?

A I believe that's right here. 7,384.

Q And did your father receive shares on the merger?

A I don't believe he had very much Fireproof stock, sir. I don't know. He might have received a small portion, a small amount of shares.

Q Do you know what happened to the stock that was issued to your family consisting of your wife and yourself and your father and your brothers?

MR. FELDSHUH: Let's break it up into each one.

THE COURT: I didn't hear you.

MR. FELDSHUH: I said, sir, that he has asked what happened to stock that allegedly was received by four or five different people. I have asked him to break it up and

indicate what happened to each one.

Q Isn't it a fact that all that stock was pledged with the Federation Bank?

A Oh, I doubt that, sir. I never pledged a share of my stock with Federation Bank. I can't tell you about the rest.

MR. FELDSHUH: Will you fix the time, Mr. Palwick, please?

MR. PALWICK: I ask that this be marked as Plaintiff's Exhibit 16 for identification. It is testimony given by Willard J. La Morte before the Securities & Exchange Commission on various dates starting with May 25, 1967.

(Plaintiff's Exhibit 16 was marked for identification.)

THE WITNESS: Starting 1967?

MR. PALWICK: The dates of the testimony start with May 25, 1967.

Q I read to you starting at line 7, page 21:

"Q Was it at any time?"

Asking a question about Federal Bank.

"A Not to my knowledge, but there was an understanding with the Federation Bank that when this stock was issued that we would -- we, the family --

I'm talking about my brothers and myself, and I believe my father is part of it, would put it with the bank.

"Q Was the stock pledged at the bank?

"A No, sir, I owe no money against it.

"Q What is it doing at the bank?

"A I don't know.

"Q Why did you put it in the bank?

"A Because I was asked to."

MR. FELDSHUH: Your Honor, I assume that these questions are being read and the answers being given from the point of view of refreshing this witness' recollection. Obviously this is not a document in evidence.

MR. PALWICK: Actually these answers are offered in evidence as an admission of the witness. This document, this transcript of testimony, was delivered to me by the defendants, by the defendant's attorney, pursuant to an order of the Court confirmed by the Circuit Court of Appeals for the Second Circuit that the testimony be made available.

Since the witness and his counsel have given me this as the record of testimony, it constitutes an admission against the witness.

MR. FELDSHUH: Your Honor, I respectfully submit that this is not an exhibit in evidence and that insofar as counsel is reading from it, that the only limit within which

such a question and answer can be read is whether or not this witness has a recollection of so testifying.

THE COURT: I think it can be read for that purpose. I think it also can be read for the purpose of showing inconsistencies. It also can be read for the purpose of showing inconsistent statements between his testimony then and statements which he has made now.

I do agree with you that the document cannot be submitted as an exhibit. You have, Mr. Palwick, Mr. La Morte here on the witness stand. If you want to refresh his recollection or probe as to the kind of testimony he made at that time with regard to this, you are free to do so. That is the reason that the document was made available to you. But you can't submit a document of that kind into evidence when you have the live witness here.

MR. PALWICK: I submit the entire transcript constitutes an admission against the witness' interest which is admissible against him, and that this is a true transcript is certified by the fact that this was furnished by the witness to me as counsel for Shattuck Denn pursuant to an order of Judge Mansfield as affirmed by the Circuit Court of Appeals.

MR. FELDSHUH: That is incorrect, your Honor.

MR. PALWICK: If they furnish documents to me, I am

entitled to use the documents.

THE COURT: Of course you are entitled to use the document, but you are not entitled to use the document to file in this court. You may utilize it for the purpose of cross examining.

MR. PALWICK: I am doing that, too.

THE COURT: You have Mr. La Morte on the stand under the rule of an adverse witness, but you can't submit that document into evidence.

BY MR. PALWICK:

Q Mr. La Morte, did you give that testimony before the SEC?

A If it says that there, yes, sir.

Q Does that refresh your recollection as to the fact that your family's stock was pledged with the Federation Bank?

A No. I wonder if it goes on a little further. Maybe it would clarify it.

Q I show you page 21 and see if you can find some place where it is clarified.

A Because, quite frankly, I do not remember pledging any of my stock to the Federation Bank.

I don't see anything in that area before or after that would refresh my memory, sir.

Q But you did so testify before the SEC?

A Yes, sir.

MR. FELDSHUH: Objection, your Honor. He has already asked that. It has been asked and answered. Repetition adds nothing.

MR. PALWICK: He has now refreshed his recollection. A renewal of the question is in order. However, he has answered.

THE COURT: All right.

A There was one place in here where it referred to Fireproof Products, that Fireproof was borrowing from the Federation Bank, and possibly the stock might have been placed there for that, but I don't recall it.

Q You don't deny that the stock was pledged with Federation Bank, do you?

MR. FELDSHUH: Objection, because he has no recollection.

MR. PALWICK: He also has been confronted --

THE COURT: This is cross examination. This is an adverse witness. I gave you, Mr. Feldshuh, pretty much of a free rein in cross examination, and Mr. Palwick is cross examining Mr. La Morte at this point. Objection overruled.

MR. FELDSHUH: It is his witness, your Honor.

THE COURT: It is not his witness. He called him

as an adverse witness.

MR. FELDSHUH: He called him. It is part of his case.

THE COURT: He called him as an adverse witness.

MR. FELDSHUH: It is true he is an adverse witness.

THE COURT: Then he can cross examine. That is the purpose of the rule.

All right.

Q Now, you testified that the partnership had an account at Schweickart?

A Yes.

Q That you thought your father, William La Morte, had authority with respect to, is that correct?

A Yes.

Q I read to you from page 42, line 16 of your SEC testimony:

"Q Let me go back to the 12,500 shares a moment.

"A Yes, sir.

"Q Those were in your account at Schweickart & Company; is that correct?

"A Yes, sir.

"Q In whose name were the shares?

"A Willard J. La Morte's account.

"Q Now --

"A The shares were in street names.

"Q The shares were in street names?

"A Yes, sir.

"Now, while you are on that; the Willard J. La Morte account in Schweickart is part of a partnership account.

"Q And who are the partners in the account?"

MR. FELDSHUH: There was no answer to that, as I recall it. He jumped from one question to another.

THE COURT: Mr. Palwick, when you read from a transcript, read questions and answers.

MR. PALWICK: I am doing that.

THE COURT: So Mr. La Morte can be made aware --

MR. PALWICK: I am doing that and I think I read it correctly.

MR. FELDSHUH: Was this an answer to that question?

MR. PALWICK: "Q The shares were in street names?

"A Yes, sir.

"Now, while you are on that; the Willard J. La Morte account in Schweickart is part of a partnership account."

MR. FELDSHUH: Wait a minute. Is that part of the answer?

MR. PALWICK: It says it is part of the answer.

I refer you to the transcript, Mr. Feldshuh.

"Q And who are the partners in the account?

"A Myself, my father, William F; Howard W., my brother; my sister, Grace; Robert MacLeay, and Elizabeth Seeling."

Q Now, does that refresh your recollection that you were one of the partners --

THE COURT: I think that when you read something that long, what I want you to do is to bring the document over here so that Mr. La Morte can see it. He may be like me. I absorb better with my eyes than my ears.

MR. PALWICK: Fine.

(Transcript handed to the witness.)

Q Now, does that refresh your recollection that as one of the partners in the account you were authorized to deal for the account?

A The shares, according to this testimony, were in Willard J. La Morte's account.

Q Which, according to page 43, was a partnership account, correct?

A Which is a partnership, and that I would have been in a position to deal in that account.

MR. FELDSHUH: Does it fix the time, Mr. Palwick?

MR. PALWICK: Well, they are speaking about 12,500

shares. I think that that refers to shares that were received on the Fireproof merger. I can't tell exactly but it looks that way.

THE WITNESS: No, sir, it was not.

MR. PALWICK: I don't see any direct reference.

Q Did you occasionally open partnership accounts in names other than yourself?

A I don't recall any, sir.

Q Did you ever open an account in the name of J. W. Lyons?

A Yes, sir.

Q Was that a partnership account?

A Yes, sir.

Q Who is J. W. Lyons?

A My brother-in-law.

Q Is he a member of one of the partnerships?

A No, sir.

Q Did he authorize you to use his name?

MR. FELDSHUH: Objection, your Honor. I don't know how this becomes relevant to the issues even in the remotest sort of way.

THE COURT: What is the relevancy?

MR. PALWICK: I am trying to show a method of wheeling and dealing in these partnership accounts that knows

no limit.

MR. FELDSHUH: Fix the time.

THE COURT: The point is that he used his brother-in-law's name in dealing with it, whether or not the brother-in-law authorized it is not too important.

MR. PALWICK: It shows a method of dealing with the shares of the partnership that we allege in our complaint are subject to his control almost purely.

THE COURT: Yes, I think I might agree with that, but I think what you can bring out is the fact that he did deal in that name.

Q It was a partnership account, is that correct?

A To the best of my recollection, yes.

Q How did you come to open the account in his name?

MR. FELDSHUH: Would you fix the time, please?

MR. PALWICK: Whenever it was opened.

Q When was it opened?

A I would say maybe 1965 or 1966 is when there was a John W. Lyons account opened.

Q Where was that opened?

A At L. J. Forget Company, Ltd.

Q Is that in Montreal?

A Montreal.

Q How did you come to open the account in Mr. Lyons'

name?

A To the best of my recollection, there was an account under the name of Willard J. La Morte and I believe there were some Canadian securities that the partnership owned that were put into the John W. Lyons account.

MR. FELDSHUH: Canadian securities, is that what I heard you say?

THE WITNESS: Yes, Canadian securities.

Q I read you from line 11 at 105 of your SEC testimony:

"Q Well, at that time, did you have more than one account at Forget?

"A At that time there wasn't any -- this was the only account at Forget.

"Q This was the first account at Forget?

"A Yes.

"Q Is that correct?

"A Yes.

"Q So that, by putting it in the name of J. W. Lyons, you weren't distinguishing it from any other account you might have had at Forget?

"A That is correct."

Does that refresh your recollection that you did not put it in the name of Lyons to distinguish it from some

other account?

MR. FELDSHUH: Your Honor, at no point have we any indication here that the subject of the securities in this account was Shattuck Denn securities. The only thing we have is it involved Canadian securities and how that can involve itself with the pleadings here or with the issue here I can't see.

MR. PALWICK: The testimony is that this was a partnership account. We are entitled on these pleadings and the issues raised by the pleadings and in this case --

THE COURT: The objection is overruled. You may answer the question, Mr. La Morte.

THE WITNESS: Could you just briefly tell me what that question was, sir?

MR. PALWICK: Would you read the question back, please?

(Question read)

A It does refresh my recollection.

Q So the answer is you did not put it in the name of Lyons to distinguish it from any other account, is that correct?

A That is what it says, that's correct.

Q Now, what happened to the shares that were put in the name of Mr. Lyons at L. J. Forget?

MR. FELDSHUH: I repeat my objection, your Honor, unless it can be established here that the shares in that account were Shattuck Denn shares with which we are concerned, namely, these partnership shares, these so-called Agent shares, the so-called Joint Stock Traders shares or the Sanford Boulevard shares. This is entirely not within the issues here.

We are not here, may it please the Court, to find out what Mr. La Morte's practices were in other situations. We are here to determine what they were in these situations, these partnership accounts, and I respectfully submit that this so-called line of inquiry is not relevant nor is it competent.

MR. PALWICK: I think it is relevant and competent to show the entire course of managing the partnership accounts on behalf of Willard J. La Morte. This is an issue raised by the pleadings. It is one of the two issues in this case. One issue is valuation of Fireproof shares, and the other issue is whether Mr. La Morte should be liable for the full profits of the partnerships, and in order to go into whether he should be liable we must show that he controls the buys and sells and so forth of the partnerships.

MR. FELDSHUH: May it please the Court, obviously in a civil case similar acts are totally incompetent, and I

respectfully submit that with regard to what he did elsewhere and with whom and a stranger to these proceedings, that that is totally irrelevant to this inquiry.

THE COURT: I am afraid that I will have to disagree with you, Mr. Feldshuh. It seems to me that what Mr. Palwick has been attempting to establish, he has every right to establish, is a pattern and course of conduct, and his conduct is not limited merely to this dealing. He is attempting to show, as he has every right to show, that Mr. La Morte, in regard to the partnerships, really had exercised, in effect, and actually controlled what went on in the buying and selling.

He is not limited to doing that in regard only to this. It may well be that showing how he dealt with the partnership generally is going to be a factor that will affect the decision as to whether or not he had control in regards to this matter.

MR. FELDSHUH: May I respectfully call your Honor's attention to the fact that the next step in this kind of inquiry would be for me to bring in Mr. Lyons and say, "Mr. Lyons, did you authorize Mr. La Morte to do this in your behalf and in your name?"

And supposing Mr. Lyons so does and so testifies. The next thing, if the Court please, we are going to get into

a number of collateral issues in each case and I respectfully submit if this testimony is now in, it is incumbent upon me and I deem it in the interest of this client to bring in Mr. Lyons and let Mr. Lyons tell you why this went on and we will go on forever.

THE COURT: You are entitled to do anything you think will be relevant and that I am going to allow. I will only make a decision about whether I will allow Mr. Lyons to testify if you produce him. Right now we are dealing with this problem. Objection overruled.

MR. PALWICK: Is there a pending question?

(Question read.)

A What shares, sir?

Q What shares did you send up?

A I don't even know whether I sent up any, sir. It could have been transferred. I don't know.

Q Mr. La Morte, let me read from page 108 of your SEC testimony, line 18:

"Q My recollection of your previous testimony is that you said you sent up 3,000, approximately 3,000, shares in the names of your children or in your or your wife's name as custodian, or trustee, for your children, in February or March of 1967. Now, do you wish to correct that, or are these additional shares?

"A No, that is still correct, sir."

A That is February of 1967?

Q That's correct.

A There were some shares -- I assume you are talking about Shattuck Denn. There were some shares that were sent up to L. J. Forget.

Q In the Lyons account, correct?

A If it says the Lyons, it would be the Lyons.

Q What is your recollection, Mr. La Morte?

A I don't recall, sir. Mr. Palwick, you will have to forgive me. I will answer any of your questions to the best of my ability, and if you know that I know something, please help me.

Q I am helping you with your SEC testimony. You are quite welcome to read it as we go along.

Now, after that, I interposed:

"Just a minute. You are just testifying to your recollection. I am not sure that is the fact. And let the record show that.

"Mr. Willner: Well, if that is not the fact, would you tell me what the fact is?

"The Witness: The shares were sent up in August, but they were transferred to -- they were transferred in February of '67.

"By Mr. Willner:

"Q What do you mean by 'transferred'?

"A They were transferred from the J. W. Lyons account to the Willard J. La Morte account."

Do you recall now what happened to those shares?

A I recall that in 1966, which is a little different than this, that there were some sales made by L. J. Forget in an account of Shattuck Denn stock that belonged to my children and/or my wife, I am not sure. There was a small number, maybe 600 or 900 shares through an error.

Q Do you recall in February of '67 shares of Shattuck Denn stock in the J. W. Lyons account were transferred to the Willard J. La Morte account at L. J. Forget in the Bahamas?

A In the Bahamas?

Q I will let you read this testimony.

A It was my understanding that at the end of '66 all of the shares held by me or the partnerships or any of them were all sent to the Bahamas.

Q Including those in the J. W. Lyons account, is that right?

A Everything that was there, sir.

Q And the name of the account in the Bahamas was Willard J. La Morte, is that correct?

A Actually I think it was a numbered account.

Q And who was the beneficiary of that numbered account?

A Willard J. La Morte.

Q Thank you.

How many accounts were there at Schweickart?

A To the best of my recollection, there were two, a William F. La Morte Special and a Willard J. La Morte.

Q Were both of those partnership accounts?

A The Special I know was, I am not sure of the other one.

Q I believe you testified earlier you weren't sure you had authority on the William F. La Morte account at Schweickart, is that correct?

A Yes, sir.

Q I read to you from page 122 of the SEC testimony:

"Q And what about the William F. La Morte account?

"A There was a document on that to the effect that instructions could be by either William F. or Willard J. La Morte, on the William F. La Morte account."

Does that refresh your recollection that you had authority on that account?

A At this time, yes, sir.

MR. FELDSHUH: Now referring to 1967, is that right?

THE WITNESS: Yes, sir.

Q And this refers to early 1966, too, does it not?

A If it does, sir, it refreshes my recollection.

Q Well, does it?

A I don't see anything here about '66.

(Mr. Palwick indicates.)

A The next couple of lines says "since early '66."

Q And you say "Yes, sir." Does that refresh your recollection?

A Yes, sir.

Q All right. Did it take place in early '66?

A That's what it says, sir.

Q Is that your testimony now?

A Yes, sir.

Q So that all transactions subsequently to the first quarter of 1966, all transactions in either of those two accounts at Schweickart were partnership accounts, is that correct?

MR. FELDSHUH: Objection, summarizing testimony. Objection. Objection as to form, your Honor.

THE COURT: The objection is overruled. This is cross examination.

A Yes, sir.

MR. FELDSHUH: Your Honor, may I respectfully request at this time if Mr. Palwick is going through a long period of this type of interrogation pursuant to your Honor's instructions yesterday I have brought here today all of our witnesses, and one of whom is an expert who has been here all day, and I was wondering, may it please the Court, if it would be possible to put that expert on so that we could finish with him.

THE COURT: It is up to Mr. Palwick. It is all right with me, although I suspect that the request comes rather late. In view of the amount of time you took with Mr. Russell I doubt we are going to have your expert on five minutes after 4:00 and finish with him by 5:00 o'clock.

MR. PALWICK: I wouldn't finish with him by 5:00 o'clock.

THE COURT: I assume you wouldn't, so I think he would be here tomorrow anyway.

MR. PALWICK: I think we should go through with Mr. La Morte.

Q Now, stock that was issued for the account of Joint Stock Traders would have been issued in what name?

A I need some help on that one.

Q Let me give you some help.

A Okay.

Q On page 125 of your SEC testimony you say:

"Q Now, on here, Joint Stock Traders received 19,428 shares. In what names was that stock issued, or name, if you know?

"A I think it's -- indicates the name it was issued in, sir; oh, no, sir, Joint Stock traders would have been in the name of William F. La Morte."

Does that refresh your recollection?

A I would like to see if I could find that 19,000 -- what was the figure, sir?

Q 19,428.

MR. FELDSHUH: What period are we talking about, Mr. Palwick? Are we before June 30, 1964?

MR. PALWICK: I don't know. I assume so.

MR. FELDSHUH: May it please the Court, Exhibit 10 shows that Joint Stock Traders had securities, had Shattuck Denn securities, but that account, that partnership, terminated on June 30, 1964.

MR. PALWICK: I withdraw the question.

MR. FELDSHUH: And those shares were transferred to Willard J. La Morte Partnership.

THE COURT: That has been established already.

MR. PALWICK: The question is withdrawn.

THE COURT: All right.

MR. FELDSHUH: Your Honor, may I respectfully request, in light of Mr. Palwick's position here, may I release my expert for today? He must go back to Philadelphia. I will certainly get him back in the morning.

THE COURT: That's agreeable with me. Mr. Feldshuh, surely he can go. I doubt he will be reached between now and 5:00 o'clock. But we are finishing this case tomorrow.

MR. FELDSHUH: I am agreeing with you, your Honor.

THE COURT: If we have to have a night session, we will finish this case tomorrow.

MR. FELDSHUH: I am entirely with your Honor in desiring to finish tomorrow. So if I may, I will release my two experts.

MR. DERFNER: At this time may we find out from Mr. Palwick how long this witness will take because we have one witness who could or could not testify today. If he could not testify today, it is in his interest to be released also.

MR. PALWICK: I can't be specific, but I judge I will go with Mr. La Morte until 5:00 o'clock. I have gone through about one-third of his testimony.

THE COURT: That is reasonable. I think we will

work on that assumption. You can release all of them.

MR. FELDSHUH: Thank you very much, your Honor.

BY MR. PALWICK:

Q Was there a Lyons account in the Bahamas as well as in Montreal?

MR. FELDSHUH: Fix the time, please.

Q In the period from 1963 to 1967.

A I don't recall, sir.

Q I read from line 20 of page 152 of the SEC testimony:

"Q Was the Lyons account opened up in the Bahamas; I know there was one in Montreal?

"A Yes.

"Q Was there a Lyons account in the Bahamas as well?

"A There is a Lyons account in the Bahamas.

"Q There is a Lyons account in the Bahamas?

"A Yes, sir.

"Q Is that a partnership account?

"A Yes, sir."

Does that refresh your recollection as to whether there was a partnership account in the name of Lyons in the Bahamas?

A Yes, sir.

Q And was there such an account?

A Yes, sir.

Q How did there come to be an account in the Bahamas in the name of Lyons with respect to the partnership?

MR. FELDSHUH: Objection, if it please the Court. We are going so far afield and so remote now, your Honor --

THE COURT: When was this? Was this in 1967?

Q When was this transaction?

THE WITNESS: Apparently he is talking about the end of '66 or early '67.

THE COURT: Did the transfer in issue take place in '67?

MR. PALWICK: The period involved in this suit is '63 to '67.

THE COURT: Objection overruled.

MR. PALWICK: Read the pending question, please.

(Question read)

A I am sorry. I am a little confused. Would you mind restating that question once more?

Q What were the reasons for opening the account in the Bahamas in the name of Lyons with respect to partnership assets?

MR. FELDSHUH: What partnership is he talking about? Is he talking about a partnership that is included within the

issues in this case?

BY MR. PALWICK:

Q What kind of a partnership account was that, Mr. La Morte? Were there any partnerships in which you were involved which are not involved in this case?

A I believe at the time we are just talking about a Willard J. La Morte Partnership because the Joint Stock Traders I believe was gone by this time and a while back I recalled the reason for the Lyons account was to keep the Canadian securities in it, and I think possibly when it went down to Nassau it contained mostly Canadian securities.

Q No Shattuck Denn securities?

A No. I read another paragraph there that the securities that were sent to Canada and were put in the Lyons account, the Shattuck Denn, were still in that account less what was sold, the 600 or 700 shares that were sold in 1966.

Q Isn't it the fact that 17,500 shares of Shattuck Denn were in that account in Montreal and shifted to the Bahamas in the name of Lyons?

MR. FELDSHUH: May I have the question, please?

(Question read)

A If it says it, why, I would say it is true, then, sir.

Q So you don't deny it?

A No, sir.

Q Now, was there an account that was opened on or about September 1, 1966 in the name of a partnership different from that we have heard testimony about before?

MR. FELDSHUH: You are dropping your voice, Mr. Palwick. I can't hear.

MR. PALWICK: Read the question, please.

I am sorry.

(Question read)

A I don't know, sir.

Q Did you ever hear of the JKL Partnership?

A I have heard of JKL, but I don't know about a partnership.

Q What does JKL mean to you?

A JKL are the initials of my secretary.

Q What is her name?

A Jane Kay Leland.

Q When did she first become your secretary?

MR. FELDSHUH: I am wondering how much further we are going to go in this direction, your Honor.

THE COURT: I am wondering about that myself. This does seem to me -- I don't know where we are going now. I think you are going far afield.

Q Did you put partnership assets in an account in the

name of your secretary or in the name of JKL Partnership?

A First, I have never heard of a JKL Partnership.

Q Let me read to you from page 206 of the SEC testimony.

MR. FELDSHUH: Your Honor, may I suggest that if counsel wishes to refresh the witness' recollection, let counsel point to the pages so we don't have on this record a repetition of the testimony or a repetition of matters contained in the document not in evidence and let the witness read it and then ask if it refreshes his recollection.

THE COURT: Mr. Feldshuh, Mr. Palwick is conducting this examination. You have a right to make objections, but make those in terms of objections.

MR. FELDSHUH: Very well.

THE COURT: You have no right to try to direct him how to examine. He is examining him properly, in my judgement.

Q "Q Mr. La Morte, there is something written on Division's Exhibit La Morte 34 bearing specifically to JKL Partnership at the top, and apparently sent September 1, 1966. Was that put on by you?

"A Yes, sir.

"Q And JKL Partnership refers to what?

"A JKP is my secretary, and Partnership would refer to the partnership account.

"Q And that would be -- would that be referring to the partnership account in Canada or to the partnership account in general?

"A It is general, sir."

Does that refresh your recollection?

A It certainly does. When I would receive brokerage statements, I would scribble in the upper right-hand corner "JKL," and if it was to go to the partnership I would put "Partnership" underneath it, if it was to be personal it would be personal, if it was to Agent it would be Agent, and she would file it under those. There is no such thing as a JKL Partnership, like I stated before.

Is my testimony clear in that respect?

THE COURT: I think it is clear. At least, it is clear to me.

THE WITNESS: Thank you, sir.

Q Were the J. W. Lyons accounts at Forget all partnership accounts?

A To the best of my knowledge, sir.

Q How many such accounts were there?

MR. FELDSHUH: Your Honor, didn't we have this once before?

MR. PALWICK: No.

A To my knowledge, there should -- normally it was

customary for there to be two accounts in Lyons, one with Canadian securities and if there was American securities there would be a U.S. account and a regular Canadian account, sir.

Q Isn't it the fact there were three Lyons accounts at Forget in Montreal?

A It could be, sir.

Q I refresh your recollection by reading line 18 of page 214 of the SEC testimony:

"Q Were there three such accounts there?

"A Yes, sir."

A The answer is "Yes, sir."

Q Yes, there were three accounts in the name of Lyons, is that correct?

A Yes, sir.

Q What was the reason for having three accounts? You testified as to reasons for having two.

A Well, it goes on further.

Q Give me your recollection at the present.

A I gave you the reason for two, that I thought one was Canadian and one was American, and the only third reason could possibly be that if there was a concentration of a certain security it might be kept separate.

Q But you have no independent recollection now as to

why the third account was opened?

A No. I believe that was for the convenience of the brokers, because this has happened before up there. For example, if I had a large concentration of a Canadian security, they would have that in one account, and if I had another Canadian security they would open up an account under the same name and they would have that in there. And that's the recollection that I have.

Q In connection with the Lyons accounts, did you have occasion to sign the name of J. W. Lyons?

A Yes, sir.

Q And how many occasions?

A I only remember once, sir.

Q What was that?

A When the account was opened.

Q You mean the signature card?

A Yes, sir.

Q Do you remember a letter dated on or about November 17, 1966, from Anderson & Valiquet to Mr. Lyons?

A Anderson & Valiquet were the auditors for L. J. Forget at that time.

Q Did you get a letter from them for certification of accounts?

A I or Lyons directly, I am not sure, sir.

Q Did you on occasion sign those certification of accounts?

A I can't remember.

Q Let me refresh your recollection from page 220 of the SEC testimony, line 11:

"Mr. Silliere: That is correct. It has to do, first of all, with Exhibit 47, which was a copy of the letter from Anderson & Valiquet to Mr. Lyons; the letter is dated November 17, 1966.

"Mr. La Morte, did you receive two copies of that letter originally?

"The Witness; Yes, sir.

"Mr. Silliere: What did you do with the original or one of the copies?

"The Witness: Signed it and returned it to Valiquet and Anderson.

"Mr. Silliere: What name did you sign it, sir?

"The Witness: J. W. Lyons."

Does that refresh your recollection that you signed the certification on that occasion?

A Yes, sir.

Q And did you so sign?

A Yes, sir.

Q Now, in connection with the accounts at Schweickart

that you testified your father had some authority over, who physically exercised the authority; you yourself or your father?

MR. FELDSHUH: At what time?

A At what time, sir?

Q During 1966 and 1967.

A I did, sir.

Q And not your father?

A Not to my knowledge.

Q Did you ever open an account with respect to partnership assets at a broker called Bouchard?

A Bouchard was the first account that was opened up in Canada.

Q And what was the date that you opened that account?

A Probably around '65, 1965.

Q In whose name was that account?

A I believe there was a Willard J. La Morte account there and then I don't recall any others.

Q Do you recall a gentleman named Fred Wepf?

A Yes, sir, I do.

Q Do you recall an account for partnership assets was opened in his name?

A Does it say it in there?

Q What is your recollection?

A I know that there was an account opened in his name.

Q And do you know whether his address was listed on the account?

A Yes, sir, I think it was.

Q Let me refresh your recollection from line 11, page 407:

"Q The statements that you have produced from Bouchard addressed to a Mr. Fred Wepf, care of Mr. W. J. La Morte?

"A Mr. Fred Wepf?

"Q Wepf.

"A Is a Canadian, lives in Ontario.

"Q Why would your statements -- I assume these are your accounts at Bouchard -- why would they be addressed to Mr. Wepf? Mr. Wepf was a nominee. Were the accounts in his name?

"A Yes, sir.

"Q Was he connected with the partnership at all?

"A No, sir."

Does that refresh your recollection that the statements were sent to Mr. Wepf in your care?

A Yes, sir, but there was a reason for that. They were initially sent to Mr. Wepf in Ontario and there came a point in time, and I believe it was in '66, the latter part

of '55, when everything that I had anything to do with was transferred from Bouchard to L. J. Forget, and we closed out Bouchard.

Q But the Wepf account was a partnership account, was it not?

A To the best of my recollection, sir. So that from then on any statements or closing outs showed my name with Wepf's name or whatever it is and everything was sent to New York.

Q Now, who had the authority to buy or sell stocks in the Wepf account?

A I did, sir.

Q Anyone else?

A I imagine Wepf did, but I don't think he did.

Q Would you explain that, please?

A Well, I am sure that Mr. Wepf signed the cards and everything and was able to transact business, but I don't think that he did in that account.

Q Was there a Lyons account at Bouchard?

A I am not sure, sir.

Q Let me refresh your recollection from line 4 of page 413 of the SEC testimony:

"Q Now, there was also a Lyons account at Bouchard's?

"A Yes, sir.

"Q Is that correct?

"A Yes, sir.

"Q Was that a partnership account?

"A Yes, sir.

Does that refresh your recollection?

A It refreshes it completely because I was wondering how we would start a Lyons account at Forget, and actually what in effect we did was transferred everything from Bouchard to Forget.

Q Now, in fact, how many accounts were there at Bouchard in the name of Fred Wepf?

A I don't recall, sir.

Q Isn't it the fact that there were two accounts?

A If it says so, yes, sir.

Q Well, what is the fact?

A Shall we look it up?

Q You may refresh your recollection.

A Where is it?

(Mr. Palwick indicates.)

A Yes, sir, there were two accounts at Bouchard in the name of Fred Wepf.

Q What was the reason for two accounts?

A Again, to the best of my recollection, it was because it would either be Canadian securities versus U.S.

securities.

Q Let me refresh your recollection from page 14:

"Q What was the reason for there being two accounts?

"A One was strictly the Willard J. La Morte Agent account, the other was the Partnership."

Does that refresh your recollection?

A Yes, sir, it does.

Q And what is the fact, according to your present recollection?

A Well, that has refreshed it and there was one account for the Agent and one account for the Partnership.

Q Did you have a Partnership account also in the name of La Cie Bourman, Ltd.?

A Yes, sir.

Q And that was a Partnership account, is that correct?

A Yes, sir.

Q What was the reason for opening a Partnership account in the name of La Cie Bourman?

A La Cie Bourman was a corporation, a Canadian corporation, that Mr. Bouchard of Bouchard offered and suggested that I might want to consider trading in a Canadian corporation, and he recommended that this company

of his testimony.

at is reasonable. I think we will

be purchased -- I believe it was some nominal amount -- and that all assets, whether they are securities or otherwise, be operated through that, I believe it was a Montreal corporation. No, I think it was an Ontario corporation.

MR. PALWICK: We will let that one go. No more direct.

MR. FELDSHUH: May I have a minute, if your Honor please?

THE COURT: Surely.

(Pause)

CROSS EXAMINATION

BY MR. FELDSHUH:

Q Mr. La Morte, in connection with Joint Stock Traders' partnership, was one of the purposes of that partnership that you should be elected a director of Shattuck Denn Mining Corporation?

A No, sir.

Q With respect --

MR. PALWICK: I object on the ground it is leading the witness.

THE COURT: Even though you examined Mr. La Morte as an adverse witness, Mr. Feldshuh is cross examining him. He is not taking him on as his own witness. He has a right to lead.

Go ahead, Mr. Feldshuh. This is one of the times when you have two cross examinations, Mr. Palwick.

MR. FELDSHUH: Yes, your Honor, I have so learned at this point.

Q Mr. La Morte, with regard to Sanford Boulevard Venture Partnership, was one of the purposes of that partnership that you should be elected a director of Shattuck Denn Mining Corporation?

A No, sir.

Q Sir, with respect to Willard J. La Morte Partnership, was it one of the purposes of that partnership that you should be elected a director of Shattuck Denn Mining Corporation?

A No, sir.

MR. PALWICK: I object on the ground these questions are conclusory and call for a bare statement by the witness. No foundation has been laid for the statement. Purpose of what, the purpose stated in the charter, purpose stated in the partnership agreement, purpose in his own mind? I submit the question is too general.

THE COURT: If you find -- I will tell you what I have told Mr. Feldshuh. If you find that the questions that he has asked need clarification, you have that opportunity.

Continue, Mr. Feldshuh.

You have opened the door, in any event.

Q Sir, with respect to the partnership, Willard J. La Morte Agent, was it one of the purposes of that partnership that you should be elected a director of Shattuck Denn Mining Corporation?

A No, sir.

Q Will you tell his Honor how you came to be elected a director of Shattuck Denn Mining Corporation?

A Yes, sir. Way back in early 1950 the family -- my father, brothers and Mr. Cameron -- started a Joint Stock Traders account with a brokerage firm which my father and a broker ran, and the broker had discretionary. He would buy and sell whatever he chose. There were a few other people in it as well, and this went along for maybe three or four years, and one of the stocks that he purchased was Shattuck Denn Mining Corporation.

If you will recall, there was quite a talk in the early '50's about uranium and they thought Shattuck would be a good security. So he purchased not only for the Joint Stock Traders partnership but for other accounts of his Shattuck Denn stock and in the mid-'50's -- and it was mostly on margin, and in the mid-'50's, or early '50's, there was a market decline that was quite severe and he was not able

to -- when they called for margin, we were not able to put up margin so in order to keep the account he had to sell off all of the better quality stock such as American Tel & Tel or Consolidated Edison, and the net result was we were left, the partnership, with a load of Shattuck Denn stock. That's how -- the first time I heard of Shattuck Denn.

Q During that period of time were you trading that account?

A No, sir.

Q Sir, did there come a point in time when Richmond Screw Anchor became a division of Shattuck Denn?

A Yes, sir.

Q When was that?

A 1957 -- oh, no. Shattuck Denn acquired in 1957 a majority interest in Richmond Screw Anchor Company, and I believe in around 1960 or 1961 they got the balance and it was merged in and became a division of Shattuck Denn.

Q What was your connection, if any, with Richmond Screw Anchor at that time?

A In 1955, the end of '55, the owner of Richmond approached me on purchasing his interest in Richmond Screw Anchor Company, and he wanted all cash, which I was not able to meet, and I knew two directors on the board of Shattuck Denn at the time and suggested to them that they consider

the acquisition of Richmond as I thought it was an excellent company.

They did, and subsequently they did buy out the interest of Mr. Snyder, who was the president of Richmond Screw Anchor Company in '57. And then prior to that they asked -- the Shattuck Denn people asked me if I would come on the board of Shattuck Denn in February of '57 to assist them with Richmond because my background had been in manufacturing similar to Richmond's.

Q When you say some of the people on the board of Shattuck Denn asked you if you would come on the board at that time, were any of those people members of the Joint Stock Traders?

A No, sir.

Q Members of Sanford Boulevard Ventures?

A No, sir.

MR. PALWICK: I object to all this. It is completely irrelevant. What does what happened back in '57 have to do with the '63 and '67 short term trading?

THE COURT: It seems to me that you were attempting to establish a pattern with regard to his partnership negotiations. I think he is entitled to counter that with showing what he did before. All right.

Q Was any member of that board of Shattuck Denn a

partner in Willard J. La Morte Agent, if it then existed?

A No, sir.

Q Or in Willard J. La Morte Partnership if it then existed?

A No, sir.

Q And from that point on did you continue to be elected to the board of Shattuck Denn Mining Corporation?

A Through the time in question, yes, sir.

Q When you say "Through the time in question," that was up until sometime in 1967, is that right?

A Well, I believe I was not reelected a director in 1968.

Q '68?

A Yes, sir.

Q You were not on that slate, the management slate?

A That's correct.

Q Sir, with respect to the partnerships now, Joint Stock Traders, Sanford Boulevard Venture, those partnerships existed and at a time when you were on the board of directors of Shattuck Denn?

A Yes, sir.

Q And during that period did you ever, in connection with your functions of a director of Shattuck Denn Mining Corporation, engage in any acts on behalf of any partnership

in relation to Shattuck Denn Mining Corporation?

MR. PALWICK: Read the last part of that question back, please.

(Question read)

THE COURT: That is not an issue here, is it, Mr. Feldshuh?

MR. FELDSHUH: I am sorry, sir.

THE COURT: I am sorry, too. That is not an issue here, is it?

MR. FELDSHUH: I believe it is, sir. Under the Rattner case we are talking about the deputization, your Honor, and also under Blau against Lehman we talk about deputization, and I want to show by this testimony that there was no deputization at all.

THE COURT: Yes, but the point I thought of the case is that he through the partnerships traded in Shattuck stock in which he had a beneficial interest, and that I thought was the issue, not that he did anything other than that as a member of the board in favor of the partnerships.

MR. FELDSHUH: May I submit this, your Honor. We have a kind of reverse situation here, one which has, I believe, so far as I know, not been decided yet. In Blau against Lehman Bros. and in Rattner, the effort was made to hold the entity, here partnerships, responsible for profits that the partnerships made by reason of the acts

of the director in being deputized to act on the respective boards. Here we have the reverse situation.

In this case what Shattuck is trying to do is the reverse of that. They are trying to say to this one partner that "You are responsible for all the profits made by the partnership."

As to that up to this day, your Honor, I know of no decision in that direction. The only place where deputization has been touched upon as being a controlling factor is in one that I described but I want to lay at rest at this stage that there was no deputization.

THE COURT: Yes, but that -- well, all right.

MR. FELDSHUH: That is the only point I have in mind.

THE COURT: I suppose I might as well let you ask the questions and we will save more time than have the discussions. So go ahead. I don't agree that the deputization that you are getting at is the deputization which is at issue here. Deputization that is an issue here is his deputization to act on behalf of partnerships in regards to trading various stock, not deputization to act for the partners as a director of Shattuck.

MR. FELDSHUH: Just to lay the issue at rest, your Honor, so at least our record is straightened out, I want to

make sure I have got that point clear.

THE COURT: As I said, I probably took more time in that than letting you ask the question.

MR. FELDSHUH: Your Honor may be right, but that is my understanding of the law.

THE COURT: All right, go ahead.

A You are probably not going to like the answer, but the answer I believe is "Yes" to the question that you asked me, unless I misunderstood you completely.

MR. PALWICK: What is the question again?

MR. FELDSHUH: May we have the question again, please?

THE COURT: I don't think the question was clear. The question was really meant, the way I understood it, whether you were deputized on behalf of the partnerships to act in any way in the affairs as a director of Shattuck, isn't that right?

THE WITNESS: That is not the question as I heard it.

THE COURT: That is what he meant.

THE WITNESS: Because one of the partnerships did help out in a situation where Shattuck Denn, that I had knowledge of as a director --

Q Did help out Shattuck Denn?

A Yes, sir.

Q Apart from a situation where they helped out Shattuck Denn -- will you describe to his Honor what that situation is, please so we will have this record clear?

A In 1957, sir, Shattuck Denn was only able to acquire a little bit more than 50 per cent of Richmond, and they paid $46 a share for it. And after that time they asked me to go to Richmond to operate it in '58, which I did. Some of the minority shareholders in Richmond that were left in Richmond became quite belligerent about the fact that Shattuck Denn was not buying their interest. But the price that they were asking was $75 to $100 a share.

So what happened is with the partnerships and my personal assets I purchased about 40 per cent of Richmond's stock at about $42 a share, which was under what Shattuck then paid, and at that time made full disclosure to Shattuck's board that I had done this and that at any time in the future they could buy that stock at my cost.

Q Which was $42 a share?

A Yes, sir.

Q And did they do that? Did they buy your stock?

A Unfortunately, no, sir. After about a year or so, Mr. Barton, who was the president of Shattuck then, asked me if I would take Shattuck Denn stock for the money that we

had laid out and we are still laying it out because we had purchased it -- I had purchased it under a three to five-year contract. So I had to keep paying them cash every month or every quarter knowing that Shattuck wanted Richmond and it would be very valuable to Shattuck, but Mr. Barton asked me if I would take stock, and rather than go into -- I told him "No," but if he insisted I would.

So he transferred to me and a few of the partnerships, whatever was involved in there, about 53,000 shares of Shattuck Denn stock at 7-1/2, I think the price was, which was to reimburse us for the third of a million dollars in cash that we laid out so that Shattuck Denn could acquire all of Richmond.

Q And this occurred in 1957?

A No. It started about '59 and was probably concluded around '60 or '61.

Q Was there any other occasion where any other act, as far as you were concerned as a director, you did and took by reason of the prompting or in the interests of any partnership?

A No, sir.

MR. FELDSHUH: I think that was your thought, your Honor.

MR. PALWICK: Nothing further.

MR. FELDSHUH: I would like to stop here for a minute, your Honor. I think I have no more.

MR. PALWICK: I thought you said you were done.

(Pause.)

MR. FELDSHUH: I have no further questions.

THE COURT: All right, thank you. You may step down.

(Witness excused)

THE COURT: Well, gentlemen, we will adjourn until tomorrow morning at 10:00, at which time we will complete this case.

MR. FELDSHUH: Your Honor, may I ask this:

Is this the plaintiff's case?

MR. PALWICK: This is plaintiff's case. The plaintiff rests.

MR. FELDSHUH: May I reserve until tomorrow morning motions, your Honor?

THE COURT: Are all of the exhibits, defendant's exhibits, marked, Mr. Clerk?

THE CLERK: Yes, your Honor.

(Whereupon, an adjournment was taken until March 23, 1973, at 10:00 a.m.)

- - -

SHATTUCK DENN MINING CORP.

vs. 67 Civ. 3222

WILLARD S. LA MORTE

March 23, 1973

(Trial resumed.)

MR. FELDSHUH: May it please the Court, last evening I reserved until this morning motions at the end of the plaintiff's case.

I respectfully move pursuant to Rule 12(h)3 that this Court does not have subject matter jurisdiction as to any transaction occurring prior to August 23, 1965; that the exhibits in evidence show actions with respect to transactions prior to that time, and I submit to your Honor that such transactions are in conflict with the provisions of Section 16(b) of the Securities Exchange Act.

Your Honor, I also respectfully move, pursuant to Rule 41(b) for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

I would, with your Honor's permission, like to discuss several areas with regard to that motion.

THE COURT: No, I am not going to hear that. That is a formal motion that I will reserve judgment on. You can

develop it if you wish in post-trial briefs. I will be frank with you. I don't think that motion has much substance, it doesn't appeal to me, but your motion with regard to the jurisdictional issue --

MR. FELDSHUH: May I get a little closer to your Honor?

THE COURT: I am sorry. I will try to talk louder.

I said that I would not hear you in a further discussion on the motion to dismiss.

MR. FELDSHUH: Yes, sir, I heard that.

THE COURT: Because it seems to me that is a formal motion and you have made your point. I am going to reserve judgment. You can develop that if there is any substance to it in your post-trial brief.

The motion that I think is of substance is the first motion, and that is the jurisdictional motion.

I have not seen all the evidence, so I am going to have to reserve judgment on it, but from what I have seen of the evidence I am not at this point persuaded that the -- and I will hear from Mr. Palwick on this -- that the plaintiff has not met that burden, at least I am leaning in that direction, in regard to any transaction prior to 1967.

Was this case brought in 1969?

MR. FELDSHUH: It was brought in 1967, and the two-year period August 25, 1963, to August 25, 1965.

THE COURT: I will have to look at the evidence, but I don't see anything -- I was listening for this and trying to see what the plaintiff was going to present to avoid this problem. It may be in the written documentation which I haven't seen.

But, in any event, Mr. Feldshuh, I am leaning in your direction on that point.

MR. PALWICK: May I address myself to that point, your Honor?

THE COURT: Yes.

MR. PALWICK: First of all, no defense has been set up of the statute of limitations in the present pleadings.

THE COURT: It is jurisdictional. I think it can be raised at any time.

MR. PALWICK: The causes, and we briefed this on the defendant's motion to amend the answer, we briefed this point entirely. The cases say that if Form 4's are not filed currently on the transactions, the two-year period runs after the filing of the Form 4.

Now, the first Form 4 that was filed with respect to these transactions was in August of 1967.

THE COURT: I think, as far as I have been able to read the cases, there are cases that seem to hold that no matter -- at least as I have read them. Of course, both of you are going to have to enlighten me on this in post-trial briefs, but I am of the opinion that the case law is that this is a matter that cannot be weighed, there is no tolling of the statute, that this was one of the statutes that does not toll under any circumstances.

MR. PALWICK: I am completely convinced of the opposite and we convinced Judge Wyatt of the opposite, and I think in our post-trial briefs we will be able to convince you of the opposite.

THE COURT: I am not deciding at this point. I am reserving judgment on it. I was telling Mr. Feldshuh and you I regard it as a very serious problem and I trust both of you will treat it seriously. I regard it more severe than the formal motion to dismiss where there are factual questions here which have to be resolved.

MR. FELDSHUH: Might I just for the record alone and for no other reason renew my motion to amend the answer as previously moved before your Honor at the opening of the trial?

THE COURT: All right.

MR. PALWICK: I move to amend the complaint to

conform with the evidence in that we now seek larger damages based on the appraisal value given by our expert.

THE COURT: All right.

MR. PALWICK: This was --

THE COURT: I am not certain either one of you has to make that motion. Both of you are moving, so it is a protection, it seems to me, that the Court is entitled to give relief upon what the evidence shows.

All right. You can now proceed, Mr. Feldshuh, with your defense.

MR. FELDSHUH: Sir, I now offer Defendant's Exhibit A in evidence, the same constituting a list of the stockholders of Fireproof as they existed on February 1, 1966, and in that list there is also included not only the number of shares of each stockholder in Fireproof but also the number of shares that each of them received upon the merger. This exhibit, your Honor, had been pre-marked and is included in the pre-trial order.

MR. PALWICK: No objection.

(Defendant's Exhibit A was received in evidence.)

MR. FELDSHUH: I now offer, sir, as pre-marked, Defendant's Exhibit B also included in the pre-trial order, the balance sheet of the Fireproof Products Company as of

MR. PALWICK: No objection.

(Defendant's Exhibit B was received in evidence.)

MR. FELDSHUH: I now offer in evidence, your Honor, as pre-marked Defendant's Exhibit C, the same constituting a list of transactions with regard to Willard J. La Morte Agent and also included in the pre-trial order.

MR. PALWICK: No objection.

(Defendant's Exhibit C was received in evidence.)

MR. FELDSHUH: I now offer in evidence, your Honor, as Defendant's Exhibit D as pre-marked and as included in the pre-trial order a list of the transactions of the Joint Stock Traders.

MR. PALWICK: No objection.

(Defendant's Exhibit D was received in evidence.)

MR. FELDSHUH: Your Honor, I now offer in evidence as Defendant's Exhibit E a list of the transactions in Sanford Boulevard Venture as the same was referred to in the pre-trial order.

MR. PALWICK: No objection.

(Defendant's Exhibit E was received in evidence.)

MR. FELDSHUH: Your Honor, I now offer in evidence as Defendant's Exhibit F, as pre-marked and as included in the pre-trial order, a list of transactions in the Willard J. La Morte Partnership.

MR. PALWICK: No objection.

(Defendant's Exhibit F was received in evidence.)

MR. FELDSHUH: Your Honor, I now offer in evidence as Defendant's Exhibit G the report of Duff, Anderson & Clark wherein the legend on its face appears "Shattuck Denn Mining Corporation Proposed Acquisition of the Fireproof Products, Inc."

MR. PALWICK: Objection. It is hearsay.

MR. FELDSHUH: May it please the Court, this is a record kept in the usual, regular course of business of Shattuck Denn Mining Corporation. It is a record that emanates from its files. It has a letter addressed to the board of directors of Shattuck Denn Mining Corporation; and with regard to its contents, this is one of the documents belonging to Shattuck Denn Mining Corporation, the plaintiff.

MR. PALWICK: No question it belongs to Shattuck Denn Mining Corporation. It is completely incompetent unless

unless he brings the person in here who wrote that report. There is no evidence it was received in the regular course of Shattuck's business.

MR. FELDSHUH: Would your Honor look at the opening page here?

THE COURT: Who wrote the report?

MR. PALWICK: A consultant, but we are not bound by that consultant's report. If he wants to bring an expert in here to testify, he is perfectly privileged to do so.

THE COURT: I think that is right, Mr. Feldshuh. I think Mr. Palwick is right. This is a report that was made by an outside organization submitted to Shattuck. It is not their document. It is a document that they maybe ordered done, but it would appear to me that there might be disagreement with it and it appears to me whoever did it ought to be here and authenticate the document.

MR. FELDSHUH: May I have it marked for identification, sir?

THE COURT: Yes.

MR. FELDSHUH: May I submit, your Honor, it is my intention to have it identified as a document that motivated this entire transaction?

THE COURT: All right.

(Defendant's Exhibit G was marked for identification.)

MR. FELDSHUH: I now call Mr. Hugh MacMullan, your Honor.

H U G H A. M A C M U L L A N, III, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FELDSHUH:

Q Mr. MacMullan, would you tell his Honor your academic background, please?

A Yes. I am a 1961 graduate of the University of Pennsylvania.

Q Will you state your business occupation and the length of time that you have been engaged in that occupation?

A I am a vice president and appraiser for the Manufacturers Appraisal Company. I have been engaged in making appraisals of the stock in closely held corporations for five years.

MR. PALWICK: Would you read back that answer, please?

(Answer read)

Q Are you a member of any professional association?

A Yes, sir, I am a member of the American Society of

Appraisers and permitted by written examination to include the appraisal specialty of intangible assets next to my name in the membership directory. That designation includes the appraisal of stock in closely held corporations.

Q How long has Manufacturers Appraisal Company been in business?

A Since 1899.

Q What?

A 1899.

Q Sir, in connection with your work, will you state the scope of the work done by you in relation to non-public corporations?

A Yes. I am responsible for the valuation of the stock in closely held corporations and for preparing oral testimony and narrative written reports relating to value.

Q Have you had occasion to testify in any tribunal with regard to the value of the shares of non-public corporations?

A Yes, I have.

Q About how many times have you done that, sir?

A I would estimate 50 or 60 times.

Q And in each of these 50 or 60 times, that was referrable to the valuation of stock in non-public corporations; is that right?

A Yes, that's correct.

Q Have you also testified with respect to arbitration sessions of any kind?

A Yes, I have.

Q And in any tribunal, sir?

A Yes. I must clarify this. The total 50 or 60 times includes these other categories that you are now mentioning.

Q Were those categories in court as well? Was that included?

A Yes, that is correct.

Q Mr. MacMullan, based upon your experience, will you tell us the factors which you employ in determining the value of a non-public corporation and its shares?

A We use many factors, and I think many of them were adequately covered by Mr. Russell.

In this particular case, however, I felt that four factors were especially important: Earnings, book value, sales and the particular contributory value of a non-operating asset.

Q You say "non-operating asset." In what way was such a non-operating asset involved here?

A I am referring to vacant land that at the time of the acquisition or the time of the merger was not contributing

anything to earnings of the company and was contributing or was recorded only in an understated manner upon the balance sheets of the company.

Q Of the factors that you have now reported to the Court, did you place any special emphasis on any one factor in comparison with the other factors?

A Yes, I did. Earnings.

Q Will you tell us, sir, the reason why you placed greater emphasis on that factor in comparison with the other factors?

A Well, I place great emphasis on that factor because in our experience it generally represents the best measuring stick, the best basis for comparison. In addition, it is most frequently considered by investors, those people who are actually creating the market through buying and selling. In addition to that, I suppose in recognition of the first two factors, the Internal Revenue Service has actually suggested that it be afforded the heaviest weighting in appraisals of this type.

Q Mr. MacMullan, now that you have testified as to the factors which you did employ and their respective weights, will you tell us how you develop these factors to be used in the appraisal of a going, non-public corporation?

A They are normally developed through a consideration

or a comparison with comparable or at least similar publicly held companies that have a standard market for their stock throughout the marketplace or the exchange upon which they are listed.

Q You have been retained by the defendant La Morte as an expert to testify as to the value of the common stock of Fireproof Products, Inc., a non-public corporation, as of February 1, 1966, is that correct, sir?

A Yes, that's correct.

Q And you are being compensated as such expert by the defendant, is that correct?

A Yes, or at least the Manufacturers Appraisal Company is.

Q That is your company?

A Right.

Q Have you examined records of and concerning Fireproof, and if you have, will you tell which records you have examined?

A Yes. I have examined annual reports including operating information and balance sheets, a proxy statement, the Duff, Anderson & Clark report that was made available to me, related correspondence and other similar information.

Q Sir, did you examine the agreement --

THE COURT: Would you give us the years of the

annual reports? It was never specified as to time. I would like to know what years, and the proxy statement.

THE WITNESS: Certainly. The proxy statement is the statement that's already, I believe, in evidence. That includes operating information from 1960 through 1965.

THE COURT: That's Plaintiff's Exhibit 13. All right.

THE WITNESS: The operating information -- the annual reports that were available to me were for the years ending December 31, 1964 through December 31, 1969, I believe.

THE COURT: All right.

Q Now, with respect to the examination of the proxy statement, you did examine, as contained in the proxy statement, the agreement between the plaintiff Shattuck Denn Mining Corporation and Fireproof Products, Inc., did you not?

A Yes, I did.

Q Upon your examination of that agreement, what did you find with respect to the terms of the exchange of Fireproof stock for Shattuck stock?

MR. PALWICK: Objection. The agreement speaks for itself.

THE COURT: The objection is overruled.

Q Proceed, sir.

A It simply provided for the exchange of Fireproof

shares for Shattuck shares at the exchange ratio of 13.21 shares of Shattuck for each share of Fireproof.

Q With respect to this provision in the agreement, what conclusion, if any, did you arrive at with regard to determining the value of the Fireproof shares?

A Well, first it obligated the Fireproof shareholders to exchange their shares for an exchange ratio that had been determined based upon the book value of Fireproof as of December 31, 1964 and the market value of Shattuck as of that same date.

Secondly, it makes no provision for an adjustment of any kind due to the relative change in financial position in either of the two companies and then once again it did fix the exchange rate at 13.21 shares of Shattuck for each share of Fireproof.

Q Well, in that connection, did you form any judgment with regard to any increase in value of the Fireproof net worth from December 31, 1964, to the date of the merger, namely, February 1, 1966?

A I wouldn't say that I formed an opinion. I am aware that the book value decreased in total but increased on a per share basis because the number of shares was fewer.

Q Did it make any difference to you whether or not there was any increase in the value of the Fireproof shares

on December 31, 1965?

A No, I did not consider that.

Q Why didn't you consider it?

A Well, because, as I have stated, the exchange ratio was fixed as of December 31, 1964. There was no way of providing for an increase or a decrease in relative values after that date. So that really becomes the effective date of appraisal.

Q Do I understand you, sir, that even if Shattuck stock, which in the month of December was at $10.75 a share, went up to $100 on February 1, 1966, that would make no difference insofar as your appraisal of value is concerned? Is that right, sir?

A That's correct, because I addressed myself only to the value of Fireproof.

Q And the contrary situation would be the same: If Fireproof went up to $1,000 a share in the interval of time?

A Yes, that's correct.

Q In other words, as I understand you, sir, the Fireproof stockholders were to get 13.21 shares of Shattuck, no matter what?

A Yes, that's right.

Q And no matter what, the Fireproof stockholders would have to give up 1 share to get that 13.21 shares, is

that right?

A Yes, that's correct.

Q Then with respect to December 31, 1964 and the ratio as then established by the parties, do I understand that that ratio was fixed, it made no difference what happened after that?

A Yes, that is correct.

THE COURT: Mr. Feldshuh, if I may interrupt for a moment.

MR. FELDSHUH: Yes, sir.

THE COURT: Am I to understand your testimony, Mr. MacMullan, that there was an agreement between Fireproof and Shattuck and that an agreement set value as of a certain date and that date was what, December 31, 1964?

THE WITNESS: It didn't set value. It set the exchange ratio. It said that this number of shares is going to be exchanged for this, regardless of what happens to the book value of Fireproof or the market value of Shattuck. In fact, the book value per share of Fireproof went up and the market value of Shattuck went down, but there was no adjustment made subsequent to that. There was no adjustment made in the exchange ratio. That remained fixed as of that date.

MR. PALWICK: Your Honor, just to straighten this

out, the agreement fixed an exchange ratio of 13.21 shares. That's all the agreement said. It did not fix it on the basis of market value or book value or anything of the kind.

THE COURT: Was the agreement entered into -- I don't have it before me.

MR. FELDSHUH: It is in the proxy statement.

THE COURT: Was the agreement entered into as of December 31, 1964?

MR. PALWICK: No, sir.

THE COURT: What I am interested in is what was the effective date? Was it December 31, 1964?

MR. PALWICK: September 14, 1965.

THE COURT: What is the significance of the December -- I see.

MR. PALWICK: If your Honor will look at the covering letter.

THE COURT: I see.

MR. FELDSHUH: The covering letter, your Honor, letter of transmittal, refers to December 31, 1964.

MR. PALWICK: The second paragraph from the bottom.

THE COURT: Now I understand. So that what you are really saying, Mr. MacMullan, is that the parties agreed on an exchange of 13.21 as of the book value of Fireproof and the market value of Shattuck as of that date?

THE WITNESS: Yes.

THE COURT: And on that basis they arrived at a ratio?

THE WITNESS: Right.

BY MR. FELDSHUH:

Q Sir, have you arrived at a valuation with respect to the fair value of the Fireproof shares as it existed on February 1, 1966?

A Yes, I have.

Q Would you tell us, sir, what that value was?

A I believe the value is best expressed as $200 per share.

Q Will you tell his Honor how you arrived and what procedures you went through to establish that value?

A Yes, I will. I would prefer to hand out something, some sheets, to everyone and review those. I think it would make it easier. It would be easier for me.

Q Do you have the sheets there?

A Yes.

MR. FELDSHUH: May I pass one up to your Honor?

THE COURT: Youare going to mark it, I presume?

MR. FELDSHUH: Yes, I would like to have it marked, please. That will be Defendant's Exhibit S.

(Defendant's Exhibit S was marked for identification.)

A Basically, I have taken three approaches to value and I will run down them very briefly.

The first approach is a return on net worth approach, which attempts to determine whether or not the subject company was making a normal or abnormal return on its net worth at the date the exchange ratio was determined.

In that instance, the net worth of Fireproof at that time was $1,758,281. Earnings for the year ending December 31, 1964, when consolidated to include the effect of both Republic Fireproofing Company, Byansel Corporation and Steel Erecting Company are $84,000 -- pardon me -- $184,000. This is considerably in excess of what we have determined to be a normal return which we estimate to be 8.2 per cent. The excess return, $39,821, may be capitalized at an intangible rate of return of 15 per cent to provide an estimate of what in fact this excess value might be over and above book value.

The companies that are listed subsequent to this approach on the first sheet are the companies I used as comparable or similar. We ran into the same problem Mr. Russell described, that there are no publicly held companies that are actually comparable. We have used five companies

that either serve the construction market or are a distributor of steel products, and we have also incorporated information relating to seven cement companies inasmuch as the vast majority of Fireproof's business related to or served concrete construction in one way or another.

We did consider the first five companies, the steel distributing companies, as more important, and accordingly we weighted them 2 to 1 for the cement companies in both this approach and subsequent approaches that we used. The inference of the answer to this approach is at the time that the ratio was fixed, December 31, 1964, it probably was not equitable to consider only the book value of Fireproof in that they had additional earnings over and above a normal return on book value.

The second approach then is a price-earnings ratio approach. It compares the price-earnings ratios of the same comparable companies and applies it to the current earnings of Fireproof.

Turning to the second sheet, we can see that the weighted average price-earnings ratio we have used a 10.8 multiplier. Applying that to the $184,000 in earnings for the year ending 12/31/64 produces an indicated value of a little over $2 million. At this point, however, we have to make an adjustment for lack of marketability. We have

compared publicly held companies that have a ready market for their stock through the exchange upon which they are traded to a small or relatively small privately held company that does not have a ready market for its stock. So we have discounted the total value by 10 per cent.

Support for that 10 per cent figure is contained, if you follow the asterisk, down where we list a number of flotations that were actually made. In other words, in order to make this stock public the stockholders would have probably had to spend about 10 per cent of their gross proceeds in order to accomplish that.

At that point, then we have a net value of $1,805,000 to which we have added the value of a non-operating asset, the vacant land, which we estimate to be worth at that time $475,000.

I think that covers the price-earnings ratio approach.

The third approach to value is a composite approach where we use essentially three contributory components of value: Earnings, net worth and sales, and do the same type of comparisons with the comparable companies as we have done with the price-earnings ratio approach, determine multipliers and work up a value that way.

You will notice that there is a difference in the

earnings figure and in the earnings multiplier used here between this approach and the price-earnings ratio approach. The difference is because I have utilized weighted three-year average earnings for the subject company within the composite approach and, accordingly, I have worked up the price-earnings ratios on the same basis for the comparable companies. This gives us then a total value by this approach after another discount for lack of marketability of $1,829,000-odd. At this point we once again add the value of the excess land, the non-operating asset. However, in this case since we have already included its contributory value within the net worth multiplier, we add only that amount that is in excess of that, in other words, the amount over book value, and once again we come up with a value of a little over $2 million.

The third and fourth pages of this handout are nothing more than the financial information and the ratios and multipliers that were developed and utilized within the composite approach. I don't think they need discussion at this point.

The last page then is headed "Conclusion of Value." Thus, at this point we have utilized three approaches to value and I would say that the return on net worth approach is probably the least reliable. The price-earnings approach is probably the next least reliable and the composite

approach probably offers a better indication of value.

We have concluded that a rounded total figure of $2 million for all of the shares of stock of Fireproof and simply divided that by the number of shares that were in existence as of 12/31/64. That number is 12,395, producing an indicated value per share of $161.35.

At this point we have considered an additional increment of value for the fact that we have been asked to value the 64.2 per cent of the stock that was actually delivered by the La Morte family. In recognition of the fact that this is a controlling interest, we have added a premium for this control of 25 per cent, producing a rounded total value then of $200 per share.

That's in summary what it is.

Q In regard to the control factor at 25 per cent, will you tell his Honor whether that's a normal and customary premium with regard to the control area as the same applied to the 64.2 per cent of the La Morte stock?

A I wouldn't want to commit myself to saying there is such a thing as a normal premium for control. It's almost always a matter of issue and sometimes a matter of compromise. I have reviewed a number of court cases that suggest the range going all the way from 10 per cent to 50 per cent. I made a study myself of a number of two-step

acquisitions wherein one company would buy another company at two different dates, either buying a minority interest first and then picking up the rest of the stock, the majority interest, or majority interest first and then at a later date buying the remainder of the stock. I have been able to substantiate a 24 per cent average premium that they pay for the majority interest, for the majority shares, over and above the minority shares. That's the basis for the 25 per cent.

Q And that is the reason why you selected 25 per cent in this case?

A Yes, that's correct.

MR. FELDSHUH: No further questions.

MR. PALWICK: Your Honor, may we have a ten-minute break at this time?

THE COURT: We will recess for ten minutes.

(Recess.)

CROSS EXAMINATION

BY MR. PALWICK:

Q Mr. MacMullan, I believe you said you graduated from the University of Pennsylvania?

A Yes, sir.

Q What was your degree?

A It was a Bachelor of Arts degree.

Q Did you study business administration or what was your major?

A My major at the University of Pennsylvania was English.

Q Did you take accounting courses?

A Yes, I did.

Q And you testified that you have previously testified as to valuation in 50 or 60 proceedings?

A I thought that I tried to clarify that. I have testified formally in court in 50 or 60 proceedings. However, I have been involved in arbitration sessions, testimony in court and matters where -- legal matters 50 or 60 times.

Q And did those 50 or 60 times always involve closely held corporations?

A No, I would say not specifically, but that, generally speaking, that was --

Q Were there any other subjects that you were involved with?

A Yes. As I explained, my job is to appraise intangible assets, including the valuation of closely held corporations. So the inference there is that, yes, I spent time doing other things, too.

Q I note you said "intangible assets." Have you ever valued tangible assets?

A Yes, I have.

Q What kind of assets?

A Real estate.

Q Are you a qualified real estate appraiser?

A I appraise real estate for the Manufacturers Appraisal Company. In fact, that is the reason I was employed originally by the company.

Q What is your background in real estate appraisal?

A I became -- I was found qualified to be hired by the Manufacturers Appraisal Company because I had been involved in running my own construction business, building houses and making commercial improvements and so forth for about three years. They felt that was enough of a background to be a trainee. Most of my training is with the company, an on-the-job type of training.

Q How many times have you been involved in appraisal proceedings regarding real estate?

A I have never testified relative to the value of real estate.

Q I note that you put a value of $475,000 on the real estate of Fireproof.

A Yes, that's correct.

Q As of what date was that appraisal?

A December 31, 1964.

Q As a matter of fact, your whole appraisal of the value of this company is as of December 31, 1964, is that correct?

A Yes, that is correct.

Q Are you aware that the relevant date for this proceeding is the valuation of the company as of February 1, 1966?

A I am aware of that particular date. I wouldn't clarify it as relevant.

MR. PALWICK: Your Honor, I move to strike this witness' entire testimony on the ground that his appraisal was as of December 31, 1964, which is not germane to these proceedings.

THE COURT: I am going to reserve judgment on that, Mr. Palwick, and I will ask you to develop it.

MR. FELDSHUH: May I be heard on it, your Honor?

THE COURT: Yes, of course.

MR. FELDSHUH: Your Honor, this witness testified that with regard to establishing values he had to look at the agreement between the parties as the same was made reflective of their understanding, all of that. Now, what he in effect says, for the purpose of establishing fair value as of February 1, 1966, the date of the merger, that date was merely a matter of convenience and nothing more. That was

a mechanical date wherein the values as established by the agreement and by the intention of the parties were merely implemented by the mechanics of the change of stock.

THE COURT: I understand that. I think that that argument has some merit. That is why I wanted to hear it further developed. I am not going to rule. I am reserving judgement so he can go ahead. It seems to me --

MR. FELDSHUH: May I make one further comment? Your Honor will recall that the witness testified that despite the fact that there was an increase in value of the Fireproof shares as of February 1, 1966, as compared with the value, book value, as of December 31, 1964, he gave no weight to that. So that, if anything, if he had given weight to that, that circumstance would have been contra and against the interests of the defendant rather than the other way around. To the contrary, he said, "No, I am not going to give weight to that because the ratio was fixed on December 31, 1964."

So that from the point of view of considering all the aspects of the situation, that, too, is important.

However, also in the earnings ratio, he did consider the record of the company during 1965.

THE COURT: I understand all that. I therefore think the point seems to me to have merit. Therefore, I just

can't out of hand strike the testimony. It seems to me that, as I understand this agreement, that it was agreed 13.21 shares of Shattuck stock would be exchanged for every one share of Fireproof?

MR. PALWICK: That is correct.

THE COURT: The parties reached that conclusion on what they regarded as an appropriate valuation of the company as of that date, which was December 31, 1964.

MR.PALWICK: They used that as the basis for the exchange ratio which was fixed in the agreement of September.

THE COURT: That is what the agreement was. As of the time that the transctions actually took place, the argument of the defendant and the reason for this evaluation is that it wouldn't have made any difference if the Shattuck stock had fallen to $5 a share and Fireproof had risen to $500 or $600 a share --

MR. PALWICK: It wouldn't have affected the ratio. The relevant point for inquiry here is what was the value of the Fireproof shares on February 1, 1966, and that is made perfectly clear by the decided cases, and that is the issue for determination and it is the only relevant issue on this point.

May I just address myself --

THE COURT: I don't think so. The problem with

that, however -- and that is why I am going to need that point addressed to in post-trial briefs -- is because my inclination to the dispute in regard to it is it hardly makes any difference. The agrement had been made.

MR. PALWICK: The point it makes a difference in is in Mr. La Morte's purchase of the stock what was the price at which he purchased Shattuck Denn stock. At the moment of the merger he exchanged his Fireproof stock for Shattuck Denn stock. Now, what did he pay for that Shattuck Denn stock, and the court's say he paid for the Shattuck Denn price the value of the fair market value of the Fireproof shares were at the time of the exchange, i.e., February 1, 1966. Therefore, we must determine the fair market value of Fireproof shares because there was no market for Fireproof shares at that time. So we cannot look to market values. It was closely held, it was not quoted in the pink sheets, it was not over the counter, there were no public sales whatever, so far as we know, so we can't look to market values, so we must look to underlying value.

THE COURT: All right, gentlemen. Since the question as to whether or not the testimony of Mr. MacMullan be stricken is in effect the ultimate decision in the matter, it is a critical question, I am reserving judgment on that and the testimony will be received.

The issue as to what the time of the valuation is is something you both will address yourselves to in the post-trial briefs. So the evidence at the present time will be received. If I decide you will be correct, Mr. Palwick, then this evaluation will not be considered. But if I decide the defendant is correct, Mr. MacMullan's approach to it will be taken into account.

All right.

BY MR. PALWICK:

Q Mr. MacMullan, in appraising the real estate at $475,000 as of December 31, 1964, what steps did you take?

A I did two things to confirm the reasonability of that figure. I did not visit the land.

Q What do you mean "the reasonability of that figure"? Did someone suggest that figure to you?

A I will explain. I mentioned previously that I considered information that I had reviewed in the Duff, Anderson, Clark report. That information does mention the vacant land upon page 26.

Q Does it give a figure?

A Yes, it does.

Q What was that?

A That was $475,000.

Q What was the book value of the land at December 31,

1964?

A I believe the book value was about or the book original cost of that particular land was about $200,000.

Q What steps did you take in appraising the land at $475,000 as of December 31, 1964?

A I accepted their figure after talking to experts who we are related to and who we have a business affiliation with.

Q You did not go out and check actual market prices of land that had been bought and sold at approximately that time in that vicinity?

A That's correct, I did not.

Q Did you check tax appraisals, certiorari proceedings involving property in that immediate vicinity?

A I did not because I felt the figure was conservatively stated as it was.

Q What was the basis for your thinking that the figure was conservatively stated?

A Our affiliations were knowledgeable people who buy and sell land in that area.

Q Just who did you talk to that you describe as knowledgeable people?

A Certainly. I talked to people in the offices of Schlessinger Real Estate Company.

Q Who did you talk to there?

A I talked to two people there, both a Mr. Peter Delgado and Mr. Joe Schlessinger.

Q When did you speak to Mr. Delgado?

A I spoke with both of these people, I would estimate, about a month ago.

Q Did you talk to them both at the same time?

A No, I did not.

Q How long did you spend -- which one did you meet with first?

A I didn't meet with them. I spoke with them by phone to describe the land to them by phone, to see whether or not the values appeared reasonable to them. They both expressed their opinion that it was probably understated or conservatively stated at $475,000.

Q Who did you call first or who did you speak to first?

A I believe that I called for Mr. Schlessinger and was unable to reach him, spoke to Mr. Delgado and then on a subsequent day or later on that day spoke with Mr. Schlessinger.

MR. PALWICK: I move to strike this witness' opinion of the value of the land as being based on hearsay.

THE COURT: That is not reasonable. This is an expert witness. He is entitled to get opinions of various

other people. You don't strike his testimony. It may well be that the persons he relied upon may have something to do with the weight. That is not a valid request.

Q When you spoke to Mr. Delgado the first time, what did you say to him and what did he say to you?

A I obviously don't recall the conversation exactly, but I described the property to him.

Q How did you describe it? What did you say?

A I described the property as -- I mentioned its location to him, told him its size.

Q What was the size?

A The size was 136,000 square feet.

Q You mentioned the location and the size?

A Right. Mentioned it had been acquired at an average price of about $1.50 a square foot during the 1950's and that I had a valuation that suggested that it might be worth conservatively $3.50 a square foot, did that in fact seem reasonable to him.

He said, "Yes," it seemed reasonable to him, in fact it seemed low to him.

Q And your whole appraisal then was based on your conversation with Mr. Delgado and Mr. Schlessinger?

A That plus the Duff, Anderson, Clark report where the original information was contained, yes, that's correct.

Q Now, did you, in checking on whether this property had additional value, do any checking as to the condition of the building in which Fireproof had its headquarters as of December 31, 1964?

MR. FELDSHUH: May I have that question?

(Question read)

MR. FELDSHUH: I understand that this property to which Mr. Palwick is referring was vacant land.

MR. PALWICK: Fireproof had its headquarters somewhere else, Mr. Feldshuh, you understand that.

Read the question back, please.

(Question re-read)

MR. FELDSHUH: "This property," meaning which property?

MR. PALWICK: Meaning the vacant land, the $475,000 subject of appraisal.

THE COURT: In any event, Mr. MacMullan appraised it as worth $475,000. I don't understand why you are arguing about that.

MR. FELDSHUH: I didn't understand about the building.

THE COURT: He can answer it.

MR. FELDSHUH: Your Honor, I still don't understand the question. I am sorry.

THE COURT: Do you understand the question, Mr. MacMullan?

THE WITNESS: Yes, I do.

THE COURT: All right, answer it.

A The question as stated doesn't quite compute. I believe you are referring to land other than the vacant land upon which they had other offices and you are developing some other line?

Q On which they then had their offices.

A No, I did not examine that.

Q Did anyone tell you that building was so dilapidated they had to find new headquarters?

A No, no one told me that but, on the other hand, the earnings and the sales that they were able to generate out of their existing facilities, I had that available to me. They were obviously able to operate and quite profitably.

Q But you don't know whether they would have been able to continue to operate out of that building?

A I guess every building has a life and at some point in time you must make other arrangements, yes. It had served them well up until that point, anyway.

Q Now I refer you to the proxy statement which is Exhibit 13, page 15, the summary of Fireproof earnings.

Did you study this page in making your appraisal

as to the value of Fireproof?

A I examined this page, yes.

Q Do you note the figure of $173,000 as net income in the third column from the left?

A Yes.

Q For 1964?

A Yes.

Q I note in your computations you have used $184,000. Where did you get that?

A The difference between the earnings and sales and information reported on the proxy statement and the figure that I have used are due to my inclusion of Steel Erecting Company information into this. The proxy statement does not include Steel Erecting Company.

Q Steel Erecting Company was a subsidiary of Fireproof, was it not?

A Not before 1965.

Q Do you know what ultimately happened to Steel Erecting Company?

A It was liquidated in 1965 into Fireproof.

Q Now, in computing book value, you took that from the statement of December 31, 1964, is that correct?

A Yes, that's correct.

Q Were there values on the books for investments or

advances to subsidiaries?

A Yes, there were.

Q Do you know what those subsidiaries were?

A I honestly don't recall what they were, no.

Q Did you ever hear of a company called Aceros Prefabricos de Puerto Rico, Inc.?

A Yes, I did.

Q Do you know what the value of the assets was on the books with respect to that subsidiary as of December 31, 1964?

MR. FELDSHUH: May I hand the witness Defendant's Exhibit R, your Honor? Would you look at it?

A My answer is I don't know what the amount is that was on the books as of December 31, 1964.

Q If I were to tell you that the approximate amount of that asset was $300,000 and that it was later written off and if you had known it was written off before you made your appraisal, would that affect your appraisal?

MR. FELDSHUH: Would you fix the time?

A I don't understand. It was written off before I made the appraisal.

Q Pardon?

A It was written off before 1964, or 1965.

Q After 1964?

A When was it written off?

Q About 1968.

A In other words, if I had had advantage of this hindsight?

Q Not hindsight. You are making an appraisal now.

A You are limited to information that is available to an appraiser as of the date of the appraisal.

Q I don't think that is true. Accountants, for example, is this not your experience, in giving a certificate, let's say, six months after a given date have to include under the rules of Accounting Society, Accounting Institute, significant changes since that date that have come to their attention.

Wouldn't you in making your appraisal take into consideration facts after the particular date which would reflect on the value of the assets as of that date?

A If I could reasonably have been expected to have knowledge of that at the -- as of date of the appraisal.

Q But you did not have knowledge of this?

A I didn't have knowledge -- I wouldn't have knowledge in 1964 or 1965 that it was going to be written off in 1968.

Q When did you make your appraisal?

q A I made my appraisal in 1973.

Q If you had known that in 1968 an asset of $300,000

had been written off, might that have affected your appraisal as of December 31, 1964?

A It might have affected it, but I believe that it would not have.

Q But it could have?

A It's possible that it could have.

Q You would have asked some questions, would you not, as to why it was carried on the books, was it making money and various other factors, would you not?

A That's exactly right. It wouldn't be cause to eliminate it from the balance sheet.

Q Not per se?

A Per se. It might have given rise to questions as to, well, was it reasonable to expect this to go out of business four years from now.

Q Right.

A Yes, that's a fair statement.

Q But it would raise questions in your mind?

A Yes.

Q If those questions had been answered one way or another it might have affected your appraisal by $300,000?

A If someone in 1964 -- if someone in 1973 who was active in the business in 1964 could have with certainty or with some degree of certainty said, "Yes, this is a loser,

it's going to be written off in 1968," all of which is very conjectural, yes, then I would say it could have that magnitude of an impact.

Q I notice that in applying your P/E ratio, your second price-earnings ratio approach, you have taken the 1964 earnings figure, is that correct?

A That's correct.

Q And you took that because you were appraising this company as of December 31, 1964, is that correct?

A Yes, that's correct.

Q Now, is it usual in appraising a company to take the year of operations immediately preceding the date of appraisal?

A I would say it would not be a reasonable approach to only consider that, but if you are going to use a subsequent approach, which considers an average or a weighted average, then perhaps it is meaningful to do it that way.

Q Isn't it more reasonable on a P/E approach to take an average of a period of time?

A No, I don't believe so, because you are comparing current earnings as compared to current market value of comparable publicly held companies to current earnings of the subject company. We use average earnings, unless you are also going to go back and determine what the price earnings

multiples would be historically for the comparable companies.

Q So you would always take the latest year in making an appraisal based on the price-earnings approach?

A Within the framework of what you just said, based on the price-earnings approach. Now, I am not by any means basing my whole appraisal on that approach, but, yes.

Q Now, suppose you had been making this appraisal, as I submit you should have been, as of February 1, 1966; you would then have taken the 1965 earnings, is that not correct?

A Well, in that case I would say that we would have had earnings in 1962, $122,000; 1963, $114,000; in 1964, $184,000. Then in 1965 we would have had an earnings figure of some $38,000 or $39,000, the exact figure escapes me.

Q If you multiplied that by 10 you would come out with a $390,000 price for the stock, is that correct?

A No, that is not correct.

Q Would you have changed your approach then?

A Yes, I would have, because in the normal course of things you could see that that was an abnormal year and that there must have been something unusual that particular year.

Q When in 1964 you showed $174,000 or $184,000 on your figures as compared with $94,000 the year before, you wouldn't have considered that abnormal, is that correct?

A I don't consider it any more near the magnitude of abnormality of the next year that came to $38,000 or $39,000.

MR. PALWICK: No further cross.

THE COURT: Mr. Feldshuh, any redirect?

MR. FELDSHUH: No direct.

Oh, just one question.

REDIRECT EXAMINATION

BY MR. FELDSHUH:

Q Mr. MacMullan, you heard Mr. Russell's testimony yesterday?

A Yes, I did.

Q You heard him testify that in his opinion the value of a Fireproof share was $100?

MR. PALWICK: Would you read the question back, please?

(Question read)

A Yes.

Q And you have testified today it is your opinion the value is $200, is that right?

A Yes, that's right.

Q Could you account for the difference, sir?

A Well, I can say preliminarily that the difference is not so muchin approaches taken as it is in information included within the approaches. I wouldn't object to the

methods Mr. Russell outlined but essentially, as I see it, there are about four basic areas where we are in large disagreement with; one, the date of appraisal; two, being whether the land is in fact a non-operating asset and should be included as such; three, whether or not there should be some additional increment of value included for control; and let me stop at 3. The other one is so minor in comparison to those three that I think I will let it go.

MR. FELDSHUH: No further questions.

THE COURT: All right.

(Witness excused.)

THE COURT: All right, Mr. Feldshuh, call your next witness.

MR. FELDSHUH: Mr. Weiss.

S A M U E L W E I S S , called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FELDSHUH:

Q Mr. Weiss, you are a certified public accountant?

A I am.

Q You are also an attorney at law?

A I am.

Q Were you such certified public accountant in the

year 1960?

A Yes.

Q And down to -- and prior thereto when did you first become a certified public accountant?

A 1929.

Q When were you admitted to the bar, sir?

A 1936, I believe.

Q Sir, you are a member of a firm of accountants?

A I am.

Q How long has that firm been in existence?

A Oh, about 1915.

Q What was the name of the firm starting in 1915?

A The Kuttner Company.

Q Did there come a point in time when the Kuttner Company's name was changed?

A Yes.

Q When was that?

A In about 1935 it was changed to Kuttner, Weiss & Kuttner, and subsequently became Kuttner, Weiss & Schlem, and then became Kuttner, Weiss & Berman, and then changed to Weiss, Berman & Sessler.

Q The Weiss referred to in those names, that Weiss is you, sir, is it not?

A That's right.

Q Sir, did you have as one of your clients a Mr. Dugald J. Cameron?

A Yes.

Q How long were you the certified public accountant -- you or your firm, of course --

A Yes.

Q -- were you the certified public accountant for Mr. Cameron?

A Personally?

Q Well, not personally, you or your firm.

A For Mr. Cameron personally?

Q Yes.

A Oh, somewhere in the late '50's or early '40's.

Q So it is upwards of twenty-five years or more, is that right?

A Yes.

Q Did you have as a client William F. La Morte?

A Yes.

Q And you also were his personal accountants, were you not?

A That's correct.

Q And you were the personal accountants, were you not, for Willard J. La Morte?

A That's right.

Q With regard to Mr. Cameron's son-in-law, Mr. MacLeay, did you at any time become the accountants for Mr. MacLeay?

A Yes.

MR. DERFNER: May I interrupt at this moment to have a word with Mr. Feldshuh about our witness, whether or not we should retain Mr. McMullan here?

THE COURT: Yes.

(Pause.)

MR. FELDSHUH: I am sorry, sir. Thank you very much.

May I have the last question, please?

(Record read)

Q Sir, did you know Mrs. Elizabeth Seeling?

A Yes.

Q And did you know her to be the daughter of Mr. Cameron?

A Yes.

Q And did you also represent Mrs. Seeling as her accountant?

A I prepared her returns also. Iprepared her tax returns also.

Q With regard to the people whom I have mentioned, did you prepare any tax returns with respect to a partnership

known as Joint Stock Traders?

A I did.

Q For what years did you prepare those tax returns? Do you have copies of them with you, sir?

A I prepared returns for Joint Stock Traders commencing with the year 1950.

Q And up to what time, sir?

A Up to the time it was liquidated.

Q Was that on or about June 30, 1964?

A That's right.

Q Do you have copies of all of those returns here today?

A I believe so.

MR. FELDSHUH: Your Honor, I would like to have them marked as one exhibit. You can designate them as 1, 2, 3, 4, all the way down. I think the next number in line is --

MR. PALWICK: I object to the admission of these exhibits, (a), on the ground they are irrelevant, and, (b) on the ground they are not included in the list of exhibits in the pre-trial order.

MR. FELDSHUH: Your Honor, there are so many exhibits that are not in the pre-trial order and during the course of preparation of a case for trial we are not limited

under the pre-trial order to exhibits that have a pertinency.

THE COURT: You may be right about it being irrelevant, but I don't see, and I don't know yet, so that I am going to admit them subject to connection, but I don't see where you are harmed in any way.

MR. PALWICK: May I have copies of them?

MR. FELDSHUH: I will let you make the copies or furnish them to you.

MR. PALWICK: You don't have them now? May I see them?

MR. FELDSHUH: Sure.

THE WITNESS: We have the returns here with all of our work papers for all the years.

MR. FELDSHUH: Just the returns.

THE WITNESS: Just the federal returns.

THE COURT: What is the purpose of this?

MR. FELDSHUH: I want to show that these exhibits contain the names of all the partners in Joint Stock Traders, shows their respective interests in Joint Stock Traders and also have the witness testify that those returns were furnished to each and every one of the partners in Joint Stock Traders upon the occasion of their preparation and filing. That's the purpose.

THE COURT: Did you hear that, Mr. Palwick?

MR. PALWICK: Yes, I did.

THE COURT: What is your reaction to it?

MR. PALWICK: I beg your pardon?

THE COURT: What is your reaction? It seems to me that is something that can be agreed to.

MR. PALWICK: That is my reaction, too.

THE COURT: Without cluttering the record.

MR. PALWICK: I think it is already in the record on those Form 4's as to percentages of ownership.

MR. FELDSHUH: One of the issues before your Honor, I believe Mr. Palwick was trying to establish, was that the people in these partnerships were not informed of the respective transactions, trades and so on. The purpose of these reports is to show that in fact they were informed and that they did file their returns predicated upon the information contained in the partnership returns.

MR. PALWICK: The thrust of my basic argument and the thrust of what I was trying to bring out on testimony was that they were not informed concurrently with the transactions.

THE COURT: You are not saying that they were not informed at the time they filed their tax returns if there were any transactions that affected their taxes?

MR. PALWICK: I am not saying that at all.

THE COURT: I would think, gentlemen, that without having these documents in you ought to get a stipulation in regard to that. I don't believe it is necessary to clutter the record up with these documents.

MR. FELDSHUH: Then may I deduce from this witness the method he prepared these returns? I will introduce only one, the one in 1964, as representative of all and I will so try to elicit that from the witness.

BY MR. FELDSHUH:

Q Mr. Weiss, with regard to the preparation of the partnership returns, what procedure did you use in reflecting the profits of the partnership, if any, and the respective interests that the partners had in the profits?

A There was furnished to our office copies of all broker statements, check books, bank statements.

Q These were original records, is that right, sir?

A Right. And from those records we prepared the tax returns.

Q Have you got the tax return, the federal tax return -- I will withdraw that.

Mr. Weiss, I show you this paper and I ask you, sir, is this a copy of the return prepared by your firm for the calendar year 1963 with respect to Joint Stock Traders?

A It is.

Q And, sir, with regard to this return, were copies of this return sent to all the named partners as they appear in the return?

A No.

Q To whom was it sent?

A This return was sent to Mr. Willard J. La Morte.

Q This particular one. Were copies of the return sent to anybody else?

A No.

Q Did Mr. Cameron get a copy of the return?

A I don't know.

Q How many copies did you send to Mr. La Morte?

A Either one or two.

Q Do you know what Mr. La Morte did with those returns?

A No.

Q With regard to the profit reported here in this return as to Elizabeth Seeling, did you take that profit and report it in her return you prepared for her?

A I did.

Q And with respect to each of the other named parties did you then take the profit as reported in the return and report it in their personal return?

A I did.

Q And when you so reported it in their personal return, did you send to the particular party the personal return?

A That's right, they each got a copy of their return.

Q And would those returns clearly label the fact it was a profit of this partnership?

A They did.

MR. PALWICK: Would the witness speak up, please?

Q Is this it (indicating)?

A Yes.

MR. FELDSHUH: I ask to have it marked, your Honor. Just one further question.

Q Was this return representative of all the prior returns that you filed?

A It is.

Q It was in the same procedure?

A Correct.

Q And you followed the same procedure with regard to inserting the profits from this partnership return into the individual's returns?

A That's correct.

(Defendant's Exhibit Y was marked for identification.)

MR. FELDSHUH: I am offering it.

MR. PALWICK: No objection.

(Defendant's Exhibit Y for identification was received in evidence.)

Q Mr. Weiss, I show you this paper and I ask you if you can identify it, sir.

A This return was prepared by my office.

Q And is this a return for Joint Stock Traders for the period -- for a period in 1964?

A It is.

Q And was this the final return filed by Joint Stock Traders?

A It is.

Q And was this return prepared in the same manner as the return now Defendant's Exhibit Y in evidence?

A The same procedure.

Q And the same procedure with respect to notifying all the partners as to their respective profits, is that right?

A Showing the respective profits on their individual income tax returns.

Q And it also showed their pro rata interest in the partnership, too?

A It did.

MR. FELDSHUH: I will offer it as the final return

liquidated to partners of Joint Stock Traders for the year 1964.

MR. PALWICK: I still think it is irrelevant, but no objection.

(Defendant's Exhibit Z was received in evidence.)

Q Sir, did you ever hear of Sanford Boulevard Mount Vernon Venture?

A Yes.

Q What was that, sir?

A It was a venture, to the best of my recollection, originally formed to acquire some real property in Mount Vernon.

Q And what did it become thereafter, if different from buying real property?

A It bought and sold securities.

Q I show you this copy of an income tax return for the year 1963. Can you identify this return?

A I prepared it.

Q Is this the return of Sanford Boulevard Mount Vernon Venture for the year 1963?

A It is.

Q Was the preparation of this return representative of the same procedure that you had previously used with

regard to all returns of Sanford?

A It was.

Q And did you report in this return the interests of the respective partners?

A I did.

Q And the profits they realized?

A I did.

Q And was one of those partners Robert A. MacLeay?

A He was.

Q Was it your practice to advise Mr. Cameron about the profits of this particular partnership where Mr. MacLeay, his son-in-law, was a member?

A Yes.

Q I show you the return of Sanford Boulevard for 1964, and I ask you, sir, did you prepare this return?

A I did.

Q And is this the final return liquidated to partners as of June 30, 1964?

A It is.

MR. FELDSHUH: I will offer, your Honor, the return of Sanford Boulevard for the year 1963 as Defendant's Exhibit AA.

MR. BALWICK: No objection.

(Defendant's Exhibit AA was received in evidence.)

MR. FELDSHUH: And the 1964 return as AB.

THE COURT: I thought we had reached some accommodation in that. I don't really see why you are cluttering the record up with those returns. There is no dispute about that. I had assumed Mr. Weiss' testimony is to the fact that the profits from these various partnerships were on income tax returns which were made known to the individual partners.

MR. FELDSHUH: I think he so testified.

THE COURT: He testified to that. What else do we need?

MR. FELDSHUH: I see, your Honor. That was the whole purpose of this.

THE COURT: Mr. Palwick is not making any contention about this. He said so.

MR. FELDSHUH: I will ask one question, then.

Q Mr. Weiss, did you also follow the same procedure with respect to the Willard J. La Morte Partnership?

A I did.

Q And you included in the returns of the various individuals the profit that the Willard J. La Morte Partnership realized, is that right?

A I did.

Q In accordance with their proportionate share?

A Correct.

Q And this was the usual practice you followed for all returns of these partnerships?

A It was.

MR. PALWICK: Did AB go in?

THE CLERK: AB did not go in.

MR. FELDSHUH: Any objection to AB?

MR. PALWICK: I don't think it is necessary, but I have no real objection.

(Defendant's Exhibit AB was received in evidence.)

Q Sir, as an attorney at law, did you render any legal services -- I will withdraw that.

As an attorney at law, did you not render legal services to the Joint Stock Traders partnership?

A Yes.

Q In this connection, sir, I show you this paper which is Defendant's Exhibit N for identification. I ask you, sir, is this a copy of a paper prepared by you?

A Yes.

Q What is that paper, sir?

A An agreement between Grace Lyons, Elizabeth Seeling,

Willard J. La Morte, Howard W. La Morte, Richard P. La Morte and William F. La Morte agreeing to go into a joint venture to trade in securities.

Q Do you know, sir, whether that agreement was executed?

A Yes.

MR. FELDSHUH: Sir, this is Defendant's Exhibit N. I will now offer it.

MR. PALWICK: May I examine the witness on voir dire, your Honor?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. PALWICK:

Q You say this was executed, Mr. Weiss. How do you know it was executed?

A I have signed copies -- signed original.

Q May I see the signed original?

A Wait a minute. I am sorry. I have a conformed copy of that agreement.

Q How do you know it was executed?

A Could I see the agreement, please?

Q The copy.

A May I see that?

Q Mr. Cameron testified it looked to him as if all

the signatures were in the same handwriting.

A This is a conformed copy.

MR. PALWICK: I object on the ground that the authenticity of this document has not been established.

MR. FELDSHUH: Your Honor, it has been established through Mr. Cameron that Mrs. Elizabeth Seeling took his place in this partnership and upon the occasion of the offer of this amending --

THE COURT: Mr. Weiss, did you execute the agreement? What did you have to do with that agreement?

THE WITNESS: I prepared the agreement.

THE COURT: Did the parties sign it in your presence?

THE WITNESS: No.

BY MR. FELDSHUH:

Q Did there come a point in time, Mr. Weiss, when you prepared an amended certificate of partners?

A Yes.

Q And is this the amended certificate of partners that you prepared?

A Yes, this is the amended.

Q Is Mrs. Seeling's name included in that?

A Yes.

Q And that is her signature? Right here, Elizabeth

Seeling?

A To the best of my recollection, it is her signature.

Q Now, sir, did you file this amended business certificate after the partnership agreement including Mrs. Seeling was executed?

A Yes.

MR. PALWICK: Hasn't that previously been marked as Defendant's Exhibit L?

MR. FELDSHUH: It has been marked. I am not offering the amended certificate. That is in evidence. I am only offering the amended agreement. Predicated upon that I reoffer Defendant's Exhibit N for identification as a copy of an agreement executed by the parties therein named.

MR. PALWICK: That is not a copy of Defendant's Exhibit L. There is no showing that this has been executed. I object.

MR. FELDSHUH: I said N. Your Honor, I believe that the state of the evidence at this point is that this is a copy prepared by Mr. Weiss as an attorney, that thereafter he filed an amended certificate of partnership. I now offer it, sir.

THE COURT: It will be received.

(Defendant's Exhibit N was received in evidence.)

BY MR. FELDSHUH:

Q Sir, were you also the accountant for Shattuck Denn Mining Corporation? And when I say "you" I mean your firm, of course.

A We were.

Q When did you become such accountants?

A I don't recollect the exact date.

Q Sir, were you also the accountants for Fireproof Products?

A We were.

Q Were you the accountants for Fireproof Products at the same time that you were accountants for Shattuck?

A We were.

Q Did you have occasion to be in touch with a Mr. Donald C. Hain?

A Yes.

Q Who was Mr. Hain, as far as you knew?

A The attorney for Shattuck Denn -- one of the attorneys for Shattuck Denn Mining Company.

Q Were you in touch with Mr. Hain at a time when Mr. La Morte was president of Shattuck Denn?

A Yes.

Q During that period of time, you were also Mr. La Morte's personal accountants, were you not?

A We were.

Q With regard to the preparation of Mr. La Morte's returns or with regard to transactions engaged in by Mr. La Morte, did you receive any instructions from Mr. La Morte with respect to giving information to Mr. Hain?

A Yes.

Q Will you tell his Honor what those instructions were?

A They were to give Mr. Hain information as to the acquisition and sale of Shattuck Denn stock during various periods.

Q And did Mr. Hain communicate with you or did you communicate with him giving him that information?

A We both communicated with each other. I gave him the information.

Q Was there ever a time that Mr. La Morte instructed you not to give Mr. Hain any information referrable to stock transactions in Shattuck?

A I have no recollection of any orders not to give information to Mr. Hain with reference to the Shattuck Denn stock.

Q I show you these papers, sir, and I ask you, do these papers come from your files?

A Yes.

Q Will you tell us, sir, what those papers are?

A These were papers prepared by Mr. Hain with reference to Mr. Willard J. La Morte's transactions in Shattuck Denn stock.

Q For what period of time, sir?

A February 22, 1957 through June 30, 1963.

Q In connection with these papers, Mr. Weiss, were transactions reflected herein with regard to the partnerships, Willard J. La Morte Agent, Joint Stock Traders and Willard J. La Morte Partnership?

A Yes.

Q Upon the occasion of the preparation of these papers by Mr. Hain, did Mr. Hain advise you of the respective partnership interests that Mr. La Morte had in these partnerships?

A That's reflected in that statement.

Q These papers were prepared with respect to ascertaining profits made in these stock transactions, is that right, sir?

A Correct.

Q And also with respect to determining the proportionate partnership interest that Mr. La Morte had in those respective partnerships?

A That is correct.

Q And it was Mr. Hain who calculated the impact that Mr. La Morte's pro rata partnership interest would have upon the profits made in these transactions?

A That is so.

Q Did Mr. Hain tell you that Mr. La Morte should pay to the company his pro rata proportionate share in the profits as the same is represented by his interests in the partnerships?

A He reflected that in the communication from him to me.

Q From him to you?

A Yes.

Q And those interests appear in part on page 2 of this report and so on throughout?

A That's right.

MR. PALWICK: Are you going to offer it?

MR. FELDSHUH: No.

Q Do you know whether or not Mr. La Morte paid that pro rata proportionate interest to -- I will withdraw that.

MR. FELDSHUH: It is redundant, your Honor, pro rata proportionate.

Q Do you know whether Mr. La Morte paid his proportionate interest in the profits as the same was reflected by this report prepared by Mr. Hain?

A It is my recollection he paid the company the amount that is shown on that statement that Mr. Hain prepared.

MR. PALWICK: May I have this marked for identification?

THE COURT: Yes, sur.

MR. PALWICK: May the record show it is the papers Mr. Weiss has justbeen testifying about, and it consists of thirteen pages. I would like to have them marked as Plaintiff's Exhibit 17.

(Plaintiff's Exhibit 17 was marked for identification.)

Q Mr. Weiss, did you ever hear of a company called Byansel?

A Yes.

Q What was that company?

A That did some trading, I believe, originally in iron and steel products and then I believe expanded to trading in securities.

Q Was that a company in any way connected with Fireproof?

A The stockholders of that company were stockholders and employees of Fireproof Products Company in the main.

Q Did there come a point in time when Byansel was liquidated into Fireproof, as far as you recall?

A I believe it may have been merged into Fireproof.

Q Who suggested the name Byansel, have you any recollection as to that?

A Either Mr. Cameron or Mr. William La Morte.

Q Have you any idea when the merger took place between Byansel and Fireproof? Do you have any records on that?

A I have no records with me here on that. No.

Q Have you any records on Byansel?

A No.

Q Would it refresh your recollection if I told you that Byansel was merged into Shattuck on or about 1962?

A Into Fireproof.

Q Fireproof. Excuse me.

A I believe it was merged into Fireproof.

Q During the course of -- I will withdraw that.

Sir, I now show you Plaintiff's Exhibit 11 in evidence and I ask you, sir, was this schedule prepared by you?

A By my office.

Q By your office. And this is a schedule of short swing profits, is it not?

A That's right.

Q By the partnerships? Look at it, please.

A I believe it reflects all the transactions of stock in Willard J. La Morte's individual name and of all the companies in which he had an interest.

Q Who asked you to prepare that, sir?

A A few people.

Q Will you identify one? Did Mr. Hain ask you to prepare it?

A Mr. Hain was one of the people, Mr. John Moss and Willard La Morte.

Q Who was Mr. John Moss at the time of the preparation of this report?

A One of the officers of Shattuck Denn Mining Corporation.

Q With regard to the preparation of the report, did they ask you to match transactions?

A They did.

Q In Shattuck Denn stock?

A Yes.

Q Upon that occasion when you were matching these transactions, did you know that Mr. Willard La Morte had not traded any of the shares that were standing in his own name?

A I don't recollect.

Q If I told you, sir -- I will withdraw that.

What did you do with regard to being furnished

with information as to the transactions?

A Mr. Willard J. La Morte furnished me with copies of all of his statements, brokerage statements.

Q And did you know --

A Confirmations and so on.

Q With regard to that information, did Mr. La Morte tell you that these were transactions in the various partnership accounts?

A I could see that by the statements.

Q And with regard to the matching that you undertook, did you segregate the matchings within one particular partnership as against those within the same partnership?

A I believe so. I am not certain now. It is possible that we matched -- took them all into one group and just matched the whole group within the six-months period.

Q Isn't it a fact, sir --

MR. PALWICK: If it would help things along, I am perfectly willing to stipulate that Plaintiff's Exhibits 11 and 12 were prepared by matching purchases and sales of the various partnerships against each other and that they were not confined within individual partnerships.

MR. FELDSHUH: And just one further concession and I have no additional questions on this subject.

Will you also state, sir, and concede that Exhibits

11 and 12 also reflect sales or transactions in the partnerships as matched against Willard J. La Morte's direct holdings?

MR. PALWICK: I understood from the prior testimony there was no purchase or sale by Willard J. La Morte individually, but to the extent there may be individual sales and purchases by Willard J. La Morte reflected in the schedules, I so stipulate.

MR. FELDSHUH: That is not my point. I agree there were no sales of Willard J. La Morte's direct holdings. All I asked was, will you concede that the partnership transactions, even though there were no sales or purchases in the holdings of Mr. La Morte personally, direct holdings, that nevertheless partnership transactions were matched against those holdings?

MR. PALWICK: I am not sure. To the extent that he had holdings that might constitute purchases or sales, I so concede.

MR. FELDSHUH: The fact remains, your Honor, that isn't quite the concession that I want. All that I want is that Mr. La Morte had 19,101 shares upon the occasion of the merger on February 1, 1966.

MR. PALWICK: I concede that that transaction is reflected in these exhibits.

MR. FELDSHUH: Right. And I say that partnership transactions were matched against those 19,101 shares even though they were Mr. La Morte's personal and direct holdings and even though Mr. La Morte in fact never sold one share of that stock.

MR. PALWICK: I stipulate that the sales of the partnership were matched against the shares received by Mr. La Morte on the merger.

MR. FELDSHUH: Wonderful. Thank you very much.

Q Mr. Hain told you, did he not, with regard to exhibit 11 in evidence, to establish a price of $8.75 as the value of the Fireproof Products Company shares, isn't that right?

A Yes.

Q You didn't arrive at that figure by yourself, did you?

A No.

Q Or make any determination with respect to the fair value of the Fireproof shares?

A I did not.

Q And that also applies to Plaintiff's Exhibit 12, where the price of $10.75 is referred to?

A That's correct.

MR. FELDSHUH: May I have that defendant's exhibit

for identification? Did you take it, Mr. Palwick?

MR. PALWICK: 17?

MR. FELDSHUH: Yes. I have got it. Sorry.

Q Mr. Weiss, looking at Plaintiff's Exhibit 17 for identification, sir, as you stated, this was prepared by Mr. Hain. Do you know whether Mr. Hain had the records of the various brokers who effected these trades?

A I am pretty sure they were available to him. I would have all of the records of the brokers.

Q Calling your attention to page 1 of 2, does that refresh your recollection as to whether or not those records were furnished to Mr. Hain?

A They must have been.

Q Do you see the names of brokers here?

A Yes, I do.

Q Broker dealers?

A Yes, I do. Ira Haupt, Hentz, Schweickart.

Q So far as you can recall, those records were available to Mr. Hain?

A Definitely.

Q And he prepared the statement, as far as you recall, as far as you know?

A The final statement was prepared by him.

Q Sir, with regard to Plaintiff's Exhibits 11 and 12,

did you make available to Mr. Hain the brokerage statements that reflected these transactions?

MR. PALWICK: Read the question, please.

(Question read)

A To the best of my recollection, yes.

Q And did you do that at the instruction of Mr. La Morte?

A Yes.

MR. FELDSHUH: I have no further questions, your Honor.

MR. PALWICK: I offer Plaintiff's Exhibit 17 for identification in evidence.

MR. FELDSHUH: No objection. I couldn't offer it. Mr. Hain wasn't here.

(Plaintiff's Exhibit 17 for identification was received in evidence.)

CROSS EXAMINATION

BY MR. PALWICK:

Q I note that you testified that Exhibit 17 was prepared by Mr. Hain, is that correct?

A The final papers, yes.

Q How about this page 1 of the thirteen-page exhibit which purports to be a letter from Willard J. La Morte to John Moss? Did Mr. Hain prepare that?

A I don't know.

Q Do you have any recollection that he did?

A No. When I said about the report, I meant the body with all of the figures, not the letter of transmittal.

MR. FELDSHUH: Speak up, Mr. Weiss, please.

A When I said that Mr. Hain had prepared this, I meant the compilation of the body of the report itself, not the letter of transmittal.

Q Let's take the second page of the exhibit where there are certain pencilled or inked-in figures. Is it your testimony Mr. Hain put those figures on?

A No, those are my figures.

Q Those are figures you put on?

A Yes.

Q I show you the last page of the exhibit and ask if that was a document prepared by Mr. Hain.

A No. It is a letter from Mr. Willard La Morte to me.

Q He states in the first sentence:

"I am returning your work sheets with some notations that were made on them."

Does that refresh your recollection as to who made the pencilled notations on the second page of the exhibit?

A I said the notations in pencil are in my handwriting. I made them.

Q He also said he encloses your work sheets. Had you prepared work sheets?

A I have voluminous papers. This went back and forth between Don Hain and myself.

Q Who prepared the work sheets?

A We both prepared work sheets. We prepared them first independently. We exchanged work sheets and made corrections, and I don't know whether that is the final figures either.

Q Then who typed up the final figures?

A I believe Mr. Hain did, Mr. Hain's office did.

MR. PALWICK: No further questions.

MR. FELDSHUH: No further questions.

(Witness excused.)

MR. FELDSHUH: Mr. La Morte.

W I L L A R D J. L A M O R T E, having been previously sworn, was recalled as a witness for the defense and testified further as follows:

DIRECT EXAMINATION

BY MR. FELDSHUH:

THE CLERK: You are still under oath.

Q Mr. La Morte, you were the president of Shattuck Denn Mining Corporation during the year 1964?

A Yes, sir.

Q You were also a director of the company at that time?

THE COURT: You don't have to go through all that. Mr. La Morte has testified.

Q Mr. La Morte, in the regular course of business of the company as the same was in 1964, was there a piece of business with respect to the acquisition of Fireproof shares by Shattuck Denn?

A Yes, sir.

Q Do you know, sir, a firm by the name of Duff, Anderson & Clark?

A Yes, sir.

Q How do you know them, sir?

A Well, the first contact that I had with Duff, Anderson & Clark goes back to the time when they made a complete report for Shattuck Denn Mining Corporation on Richmond Screw Anchor Company.

Q Who were Duff, Anderson & Clark?

A They are a Chicago based appraisal engineering firm, consultant firm with offices in other cities that had an excellent reputation, did work for large blue chip companies. They were recommended to the Shattuck Denn board by one of their -- one of the Shattuck Denn directors by the name of Herb Levy who lived in Chicago and was a member of the Stock

Exchange firm whose firm had also used Duff, Anderson & Clark.

Q At that particular time Duff, Anderson & Clark were called in to make an appraisal of the Richmond Screw Anchor Company, is that right?

A The acquisition of Richmond Screw by Shattuck Denn back around 1956 or 1957.

Q And did you have occasion to see the report that was submitted by Duff, Anderson at that time?

A Yes, sir.

Q It was about 1957 that you became a director of Shattuck, is that right?

A That is correct. They had already made a report, I believe it was in '56, and one was made available to me as a director at that time. And since that time Shattuck has used Duff, Anderson & Clark on other considerations that the board had. I know they were considered on the Fireproof acquisition, there was also another company, Lang Tool, that Richmond acquired, and they were considered on one other one and the report was unfavorable and it didn't go through.

Q Sir, with regard to Defendant's Exhibit G for identification, I ask you, sir, do you recognize that document?

A Yes, sir.

Q What is that document?

A This is a report by Duff, Anderson & Clark on the Shattuck Denn Mining Corporation proposed acquisition of the Fireproof Products Company.

Q Sir, in 1964, was it in the usual and regular course of the business of Shattuck Denn to retain Duff, Anderson & Clark to make an appraisal of Fireproof Products Company?

MR. PALWICK: Objection. It calls for a conclusion of the witness.

THE COURT: I don't think I understand the question, in any event. So I am going to sustain the objection on that ground. I don't understand what you mean by "was it in the usual course of business."

MR. FELDSHUH: I want to show, your Honor, that this report was merely a report -- I will withdraw that.

Q Was it in the usual and regular course of business of Shattuck Denn as it was in 1964 to retain Duff, Anderson & Clark --

MR. PALWICK: I object to the form of the question on the ground it calls for a legal conclusion.

MR. FELDSHUH: I didn't finish the question.

Q -- as to the Fireproof acquisition?

THE COURT: I don't believe that your adding the

phrase "usual course of business" will be helpful at all. I don't understand that. I recognize and I understand if you ask him a question if they retained them. That's fine. He can answer that question. It is not going to help you in terms of trying to get that document in to add the words "in the usual course of business," because in the usual course of business, as far as I am concerned, there is no predicate for that.

MR. FELDSHUH: Let me try another approach because it is important and relevant evidence.

Q Mr. La Morte, as president of Shattuck Denn Corporation in 1965, do you know whether Duff, Anderson & Clark was retained as appraisers to make a report with respect to Fireproof Products Company, Inc.?

A They were, sir.

Q And were they so retained by Shattuck Denn?

A Retained under the authority of the board of directors, yes, sir.

Q And in due course, having been so retained, did Duff, Anderson & Clark file and submit a report?

A They did, sir.

Q And did that report, after it was submitted, was that considered by the board of directors of Shattuck?

A Yes, sir.

Q And did that report become part of the papers, filed papers, of Shattuck Denn kept by Shattuck Denn in the usual and regular course of its business?

MR. PALWICK: Objection.

THE COURT: Objection overruled.

A Yes, sir.

Q And I ask you, sir, is this, Defendant's Exhibit G, from the files of Shattuck which Shattuck kept in the usual and regular course of its business in 1965?

A It is, sir.

MR. FELDSHUH: I offer it, sir.

MR. PALWICK: Objection on the ground it constitutes hearsay testimony of an expert without the opportunity to cross examine.

THE COURT: Objection sustained. The only way that that report can be admitted, Mr. Feldshuh, is it will be admitted for the purpose of showing a report was made, but as to what is in the report it can't be admitted under these circumstances.

MR. PALWICK: We concede a report was made.

MR. FELDSHUH: May I submit, your Honor, the report having been made and Shattuck being the plaintiff in this action -- the plaintiff -- and this coming from the files of Shattuck, I submit, your Honor, that the weight to be given

to the report is certainly a question for your Honor, but its competency, I submit, is proper. Your Honor may give it no weight absent a witness, a live witness, before you. You may just read it and say, "I give it no weight," but --

THE COURT: It is inconceivable to me and, of course, I am willing to be enlightened, but it is inconceivable to me that a report from an outside agency made by concededly experts who made the report to the company and what the company did with it was to receive it and put it in its files, and then for you to -- it is not a report that the company did, that the officers had anything to do with, and then for it to be received without having Mr. Palwick having an opportunity to query, as he did, with Mr. MacMullan on his theory and as you did with Mr. Russell in regard to whatever theories were involved, their validity and how they arrived at them and so forth, this is not only hearsay but prejudicial to the defendant.

I am not going to admit it.

MR. FELDSHUH: I see, sir.

THE COURT: I mean to the plaintiff. I am sorry. I got my parties mixed up.

I can't see how that can be admitted.

MR. FELDSHUH: I take it, sir, at any rate, you

sustain the objection. The report has been marked for identification.

MR. PALWICK: It has been marked for identification, hasn't it?

MR. FELDSHUH: G for identification.

Your Honor, at this time I would like your Honor's permission to have Mr. Derfner, co-counsel, take over the interrogation of Mr. La Morte. We are now going into the areas of the matchings which we state were improper and the extent to which they were improper. Mr. Derfner and Mr. La Morte together worked on it, and I think, with your Honor's permission, I would like to have Mr. Derfner conduct that interrogation.

MR. PALWICK: Your Honor, would this be an appropriate time for lunch?

THE COURT: I will let him proceed.

EXAMINATION BY MR. DERFNER:

Q Mr. La Morte, I show you Defendant's Exhibit T marked for identification. Can you identify that paper?

A Yes, sir. That is Schedule A of the Willard La Morte Agent account listing all of the shares that were sold and purchased for a two-year period commencing with August, I believe it was, 24, 1967, and back to August of '65.

THE COURT: Can you hear him?

MR. PALWICK: Yes, I heard that.

(Counsel confer.)

MR. FELDSHUH: Keep your voice up, please, Mr. La Morte.

Q Mr. La Morte, do you know where the information that is reflected on this schedule was gotten from?

A Yes. It was taken from the original brokerage statements and factual compilations that were made by both Mr. Hain and Mr. Weiss.

THE COURT: Excuse me. Mr. Derfner, don't you have copies?

MR. DERFNER: Yes, I am going to offer them in evidence.

THE COURT: Let him see them now so he can be studying them while you are examining.

MR. PALWICK: Is this C?

MR. DERFNER: T.

MR. PALWICK: S is in evidence or for identification?

MR. FELDSHUH: This would be AC.

THE CLERK: S is not in evidence.

THE COURT: Are you offering Mr. MacMullan's S for identification?

MR. FELDSHUH: It was admitted, sir. There was no objection.

THE CLERK: I have it for identification.

THE COURT: We will admit it now, in any event. S is admitted.

(Defendant's Exhibit S was received in evidence.)

MR. DERFNER: At this time I will also give plaintiff copies of our Exhibits U for identification, W for identification and V for identification and X for identification.

(Counsel confer.)

MR. PALWICK: S has not been admitted yet?

THE COURT: It has.

MR. PALWICK: But not T?

THE COURT: T has not. I interrupted him so he could give you copies.

MR. FELDSHUH: Off the record, your Honor.

(Discussion off the record.)

THE COURT: Are you ready to proceed?

MR. DERFNER: At this time I would move to admit Exhibit T in evidence.

MR. PALWICK: May I examine on voir dire?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. PALWICK:

Q Who did you say prepared Exhibit T?

A I beg your pardon, sir. I got lost.

Q Who prepared Exhibit T?

A Mr. Derfner and myself, sir. You said way back in --

Q Who prepared it? Who did the computations?

A This was a compilation that was taken from the combined efforts of Hain, Weiss and myself, sir.

Q Did you do the original computation?

A I did at one time, yes, sir.

MR. PALWICK: No objection.

THE COURT: All right, received.

(Defendant's Exhibit T was received in evidence.)

Q Mr. La Morte, I show you Defendant's Exhibit U marked for identification, entitled "Schedule B, Willard J. La Morte Agent." Can you identify this?

A Yes, sir. This is a compilation of matches that were made by me utilizing all of the transactions of Schedule A slotting them within the two-year period according to I believe it is Rule 16 of the SEC or 16 -- whatever it is -- within the limitations of the two years.

And they were arranged the cheapest price within a six-month period on either side of the transaction was matched with the highest price sold within that same period of time.

Q You say the lowest price acquired was matched with the highest price sold?

A That's correct, sir.

Q And whose handwriting is that?

A That's mine, sir.

MR. DERFNER: I would offer this as Defendant's Exhibit U in evidence, your Honor.

MR. PALWICK: No objection.

(Defendant's Exhibit U was received in evidence.)

Q Mr. La Morte, I show you Defendant's Exhibit V marked for identification and I ask you if you can identify this paper.

A Yes, sir. That's Schedule A of the Willard J. La Morte Partnership, and here again this listed all the trades within two years from the commencement of this action back and it showed all of the purchases and all of the sales conducted by the Willard J. La Morte Partnership account.

Q And the information that is reflected in this schedule, do you know where that information was taken from?

A That came from the original schedules that were prepared by Messrs. Hain, Weiss and myself way back.

MR. DERFNER: I move that Defendant's Exhibit V be admitted in evidence, your Honor.

MR. PALWICK: No objection.

(Defendant's Exhibit V was received in evidence.)

Q Mr. La Morte, I show you Defendant's Exhibit W marked for identification and I ask if you can identify that paper.

A Yes, sir. This is the results of the matching of the Willard J. La Morte Partnership account, and here again the same procedures were followed.

Q When you say "the same procedures," what are you referring to?

A In matching the --

MR. DERFNER: I withdraw that question.

Q Which procedures are you referring to when you say "the same procedures"?

A The procedures of matching in the Willard J. La Morte Partnership were the same as used in Willard J. La Morte Agent account.

Q Now, Mr. La Morte, referring to Exhibit T, which is Schedule A of Willard La Morte Agent --

MR. DERFNER: Your Honor, would the Court like a copy of this?

THE COURT: Yes.

Q -- I notice that the first column on the left-hand side is entitled "Transaction No." Would you tell the Court what that refers to, please?

A Yes. That is a number that was arbitrarily given as securities were purchased, and when I say "arbitrarily," it is consecutive, so that anyone at any time can refer to the matches by transaction numbers. So that if you want to check my figures or if the Court wants to check my figures or something, the Court actually can pull out the transactions that were used to insure that the maximum profits were derived.

Q And the next column, moving to the right, is entitled "Date." Does that refer to the date of the transaction number?

A That is the date of the transaction, sir.

Q And the next column moving to the right is "Number of Shares"?

A Yes.

Q Would you tell us what that refers to, please?

A "Number of Shares" means the amount of shares that were involved in that particular transaction on that

particular date.

Q I notice at the top of the heading "Number of Shares" there is a legend "Purchases." Does that refer to the number of shares purchased on that date?

A Yes. The pages are actually divided in half. On the left side is all of the purchases and on the right side is the sales.

Q And then the next two columns moving to the right is Price Per Share and Total Price. Does that refer to the price per share paid in each given transaction and the total price of that transaction?

A Yes. Now, you will notice that the price per share is $7.26, for an example. We all know that the exchanges deal in eighths of a point. So, therefore, what was done here is the total price paid was divided by the number of shares so that the price per share could have been inserted here, which makes it easy to compare against the sales.

Q The next three columns moving to the right appear under the legend "Sales" and under that we have "Number of Shares, Price Per Share and Total Price." Do the same explanations for these columns apply to the Sales column as applied to the Purchases column?

A Yes, sir, except that the date on sales is also on

the left side under purchases.

Q Are these transactions arranged in chronological order, Mr. La Morte?

A Yes, they are.

Q And the transaction dates run from 9/15/65 through and including 7/29/66, is that correct?

A That is correct, sir.

Q Was there any reason why that period was chosen?

A Yes, sir, the period was chosen because this suit was instituted --

THE COURT: You have already answered that.

THE WITNESS: Thank you, sir.

MR. FELDSHUH: August 24, 1965.

Q Referring now, Mr. La Morte, to Exhibit U entitled Schedule B, Willard J. La Morte Agent, you have testified this is a schedule of the matchings. Would you explain to the Court how this was done, please?

A Yes, sir. All the transactions that took place in the Willard J. La Morte Agent account were placed in Schedule -- recorded in Schedule A. Then Schedule B was used where all of the purchases made by the Agent account were offset with the highest price profit by taking the lowest price purchased and offsetting it against the highest price sold within the six-month period of the actual

transaction. In other words, some of these could have almost reached a year's duration.

Q The first entry on Schedule B is transaction 6 and, as I read it, that's a purchase of 200 shares, is that correct?

A That's correct.

MR. PALWICK: What exhibit are you referring to?

MR. DERFNER: Exhibit U in evidence.

Q Would you explain to the Court how you came to match transaction 6 with transaction 33 as it appears on Exhibit U?

A Yes, sir. Transaction 6 indicates that on October 27, 1965, 200 shares were purchased for a cost of $1529 and that this was offset over the proper time period with transaction No. 33, where we sold 200 shares at $8.80, or $1761.96, and that was the most -- the highest price during that period.

Q During which period?

A Well, six months before October 27, '65, back to, I believe it was, August, 1965.

Q So you used August, 1965 as the cut-off date going backwards?

A Going backwards.

Q And did you use that same procedure for the rest of matches as they appear on Exhibit U?

A Yes, sir.

Q And I notice on the bottom of this exhibit you have a legend "Total Profit, $1890.96.

A Yes.

Q What does that represent?

A That was the total profit that the Willard J. La Morte Partnership realized under the rules of the SEC.

Q You are talking about short swing 16(b) profits?

A Short swing profits, that's correct.

Q Immediately below the total profit there is a legend appearing, "La Morte, Willard J., interest in account for 1966 equals 11.18 per cent equals $211.40."

Would you tell us what that represents?

A That is my proportionate interest in the partnership of Willard J. La Morte Agent.

THE COURT: Would you explain to me item No. 6? It is line 6. 2166. I have been trying to read it as transactions 39 and 40, but I can't make head or tails of it.

MR. PALWICK: 39 and 40 refers back to Exhibit A, your Honor.

THE COURT: Exhibit A?

MR. DERFNER: Schedule A, Exhibit 2.

THE COURT: I can't figure it out. It says 3400 shares and it seems to me -- that is why I want some

explanation.

THE WITNESS: I can explain that to you.

On February 1, 1966, the Willard J. La Morte Agent account acquired by virtue of the Fireproof merger 515 shares which it had owned and another 5,136 shares which it received as capital from some of the partners. And this was done --

MR. DERFNER: Your Honor, I can take him through this quicker and narrow the point.

THE COURT: I see 3400 shares and $36,000. I get different figures. I am trying to figure it out.

Q On Exhibit T, Mr. La Morte, in transactions 39 and 40 there appears a price per share of $8.75. Is that the price that you used in your matching on Schedule B?

A No, sir. I used $10.75.

Q Why did you use that price?

A Because $10.75 was the contractual price which we were all obligated to live up to and the board of directors in December, '64, fixed the price of $10.75 on the Shattuck Denn stock.

Q Okay. Also in transactions 39 and 40, we have a total number of shares acquired being 5651, yet on Schedule B, which is Exhibit U, there only appears 3400 shares. Would you explain to the Court why only 3400 were used in matching as opposed to the total number acquired on that

date?

A Yes, sir. Of the total amount acquired, it's greater than what we used, but in matching within the period allowed, we can only utilize 3400 shares. Either the price got to the point where it wasn't a profit or there weren't any transactions. So that any transactions that were made were tabulated and then the number of those transactions were offset against the total amount received, which in this case amounted to 3500 shares.

Q Referring now to Exhibit U, the last transaction number reflected there is 83. Would you tell us, please, Mr. La Morte, what was the price per share paid -- sorry -- the price per share in transaction 83?

A Transaction 83 would indicate that --

Q Just the price per share.

A $10.78.

Q And the price per share that you had assigned to the shares acquired in transactions 39 and 40 was $10.75, is that correct?

A $10.75.

Q So is it our understanding there were no other transactions whereby the price per share -- withdrawn.

Were there any other transactions where shares were sold and the price per share was greater than $10.75 per share?

A Only those that we were able to match, that's all.

Q There are no others other than those reflected on Exhibit U?

A That's correct, sir.

THE COURT: We will take our luncheon recess at this time. We will resume at 2:00 o'clock.

(Whereupon, a luncheon recess was taken until 2:00 p.m.)

- - - - -

AFTERNOON SESSION

2:12 P.M.

W I L L A R D J. L A M O R T E , resumed

MR. DERFNER: Your Honor, in this witness' previous testimony it was brought out there was an error in our Exhibit T which was Schedule A of Willard La Morte Agent, and that was on transactions Nos. 39 and 40 where the price per share was reflected as $8.75 per share. For the purpose of this exhibit it should be reflected as $10.75 per share.

MR. PALWICK: Objection, your Honor. This exhibit stands as submitted. If they want to offer an amended exhibit they may do so without objection from me, but this is an exhibit that has been offered and has been received and should not be amended as received.

THE COURT: That seems unduly technical.

MR. PALWICK: They made an admission the price they paid for the stock was $8.75, which is our position, and we should be permitted to take advantage of that admission.

MR. DERFNER: I hardly think it is an admission. These are work sheets that were made up to determine what the various liabilities would be, and for the Court's information there were work sheets made up at $8.75, which is the contention of the plaintiff, and at $10.75, which is our contention, and it is no admission at all.

THE COURT: What does the changing of the price to $10.75 do in respect of Schedule B? Does that then make that -- no, it doesn't.

MR. DERFNER: Schedule B was figured on the basis of $10.75.

MR. PALWICK: It would add approximately $6800 to the profit, $2 times 3400 shares.

MR. FELDSHUH: Your Honor, the only error in that entire exhibit is the legend $8.75. All the calculations were made on the basis of $10.75. If it stands at $8.75, it misrepresents the calculations and all it is, we are just striking out that. We are not changing any calculations at all.

THE COURT: If you make it $10.75, would the total price paid come out to $4500 as it is here?

MR. DERFNER: Yes, that would be correct also, the total price would have to be changed, but for the purpose of Exhibit U, which was based on Exhibit T and really is a pertinent exhibit here to show what we contend the real 16(b) profit is, we used the $10.75 figure. So when you put the two together it would be misleading.

MR. PALWICK: I submit that their explanation is on the record and should be permitted to remain on the record and the exhibit should be permitted to remain in its

pristine condition.

MR. DERFNER: If I might just add, it is not in its pristine condition because when we discovered that, we changed it on the original exhibit but not on the hand-outs.

THE COURT: The exhibit you submitted --

MR. DERFNER: There is a pen and ink change made on that.

MR. PALWICK: When was that made?

MR. DERFNER: I am not certain when it was made. It was made today.

MR. PALWICK: Before or after the exhibit was submitted?

MR. DERFNER: I am not certain.

THE WITNESS: I believe I made it earlier today.

THE COURT: But you are not certain?

THE WITNESS: I am pretty sure.

THE COURT: All right, Mr. Palwick, what is your view?

MR. PALWICK: Well, if the exhibit was submitted with a $10.75 figure with a cross-out and we have the explanation on the record, then I suppose all of our exhibits should be conformed to that. If it was submitted with the $8.75 figure, then I submit the explanation should be on the record

and so forth.

I know you are not Solomon, but you are going to have to make the decision.

THE COURT: I have no way of knowing. Mr. La Morte said he made it before it was submitted. The exhibit as I saw it, however, does not list any total price since they were not calculated, so that on that basis the exhibit ought to show 515 at $10.75 with $8.75 crossed out; on transaction 40, 5,136 shares with $8.75 crossed out and $10.75 in its place, and, as I saw the exhibit, the total price in each instance is crossed out with no substitution in its place.

MR. DERFNER: That is correct, your Honor.

Your Honor, I think the Court has not yet been provided with a copy of Exhibit V. Am I correct?

THE COURT: I have not.

MR. DERFNER: Or did we admit that?

THE COURT: Yes.

DIRECT EXAMINATION (Continued)

BY MR. DERFNER:

Q Mr. La Morte, Exhibit V in evidence is entitled "Schedule A, Willard La Morte Partnership." It appears to be very similar to Exhibit T in evidence. Would you tell us, was the same procedure used in compiling Exhibit V as

was used in compiling Exhibit T?

A Yes, sir.

Q And you have previously testified that you had taken these figures from figures that were compiled by yourself and your accountants, is that right?

A And Hain.

Q And Mr. Hain?

A Right.

Q Referring now, Mr. La Morte, to Exhibit W in evidence, which I am providing the Court with a copy --

THE CLERK: No, it is for identification.

MR. DERFNER: It is?

THE CLERK: Yes. They were pre-marked.

Q Can you identify Exhibit W for us?

A Yes, sir.

Q Tell us what that is, please.

A That's my work sheets for matching used on the Willard J. La Morte Partnership account.

Q And whose handwriting is that?

A That is mine, sir.

MR. DERFNER: Your Honor, at this time I ask Exhibit W for identification be admitted in evidence.

MR. PALWICK: No objection.

(Defendant's Exhibit W was received in evidence.)

MR. PALWICK: Has V been received?

MR. DERFNER: V has been received, right.

THE CLERK: Yes, V has been received.

Q Referring now to Exhibit W, the first two entries are transactions 1 and 2, is that correct?

A That is correct, sir.

Q And I notice that on transaction 1 the number of shares is 500, transaction 2 the number of shares is 2500. Is that also correct?

A That is correct, sir.

Q Then immediately to the right of that there is an 1100 figure. Would you explain that, please?

A Yes, sir.

THE COURT: There is 1400 and 1100.

MR. DERFNER: That is correct, your Honor. There is a 1400 figure crossed out and an 1100 figure written below that.

A Of course, in matching you take the -- of those shares eligible I believe to be included in matching, you try to match as many as you possibly can, again using the lowest price cost with the highest price selling -- with the highest selling price within the limits of the six-months --

within the six months before or after. So that of the 3,000 shares made up of 1 and 2, for matching purposes we could only use 1100 shares because either the price or the time ran out on using the entire 3,000 shares.

MR. PALWICK: May I pose a question at this point, your Honor?

What does transaction 1 and 2 refer to?

THE WITNESS: Transaction 1 and 2, sir, is on Schedule A on the left side. You see, that is one of the reasons this is very much clearer than those other figures.

MR. PALWICK: Does that refer back to the Agent account?

THE WITNESS: Willard J. La Morte Partnership, sir.

MR. PALWICK: Exhibit V doesn't have a transaction 1 and 2.

THE COURT: Exhibit V?

MR. DERFNER: Maybe I did not give him the entire exhibit, your Honor. My apologies.

MR. PALWICK: I didn't mean to interrupt, your Honor, but I couldn't understand the course of the examination.

MR. DERFNER: Could we have the last question read back, please?

(Record read)

MR. DERFNER: Your Honor, so we don't have to go

over it, was the explanation clear? I am not certain. We were interrupted in the middle.

THE COURT: The explanation was, if I understand it, in terms of matching he couldn't match the whole 3,000 shares and had to use some of them because the time for doing so had run out.

THE WITNESS: Or the price.

THE COURT: And therefore he only used 1100, matched 1100 against that 3,000.

THE WITNESS: Yes, sir.

Could I inject one other thing to the Court while you are on that? If you will look immediately underneath that 2500 here, sir, and one column over to the right, you will see a figure $1,916.24.

THE COURT: That is on line 4?

THE WITNESS: Yes, sir.

MR. PALWICK: Line 4 of which exhibit?

MR. DERFNER: W.

THE WITNESS: And if you will notice that each figure underneath that progressively gets smaller, so that when you get to the bottom it is 832.48, so that you can see how readily you can pick out the highest prices used to create the largest profit.

Q Mr. La Morte, you testified there are two possible

limitations to matching, one being the time period and the other being the price. In the case of your matchings in transactions 1 and 2 on Exhibit W, which was the limitation that allowed you to match only 1100 shares?

A The acquisition was made on September 3, 1965, so that we could only go up to the six months -- within the six months after that time, which brought it up, as I recall from my other work sheets, to March sometime, but we didn't have any transactions then, so that we actually ran out January 18, '66.

Q So it was the limitation of time, is that correct?

A Yes.

Q And were the other matchings that are reflected on Exhibit W done in the same manner that you have previously testified?

A Yes, sir, except I don't think it was time in this case. We were able to take on all the others, these less than six months before and less than six months after the transactions.

Q Are you talking now about transactions 1 and 2?

A Yes. 1 and 2 were limited both ways. We were limited by the -- we were limited to August of '65 by the two-year statute, but that's the only one on there that was confined to that. The rest had its full range.

Q Now, going to page 2 of Exhibit W you have an item maked "Total Profit of $17,195.10." What does that reflect, sir?

A That, sir, is the total liability of all the shares that were traded in this account.

Q And just below that -- withdrawn.

When you say "total liability," you are again referring to 16(b) liability, correct?

A Yes, sir.

Q Immediately below that there is a 1966 figure and immediately below that a 1967 figure.

A Yes, sir.

Q Would you explain those, please?

A We divided it up into the profits that were made in 1966 and in 1967 as the interest of the partnerships varied slightly in those years.

Q I see. And then coming below, that last entry, we have La Morte, Willard J., interest 1966, 34.173 per cent and then $1,209.82 equals $413.43.

A Correct.

Q And what does that reflect?

A The $413.43 is my proportionate share of the profit that was generated in 1966.

Q And then we have "1967, 35.30 per cent, $15,985.28

equals $5,642.80." Does that, sir, reflect your proportionate partnership interest for the year 1967?

A That does, sir.

Q Immediately below that is "Total liability of Willard J. La Morte, $6,055.23." What is that?

A May I correct that? It is $6,056.23.

Q I am sorry. That is correct.

A And that is my total liability for the years 1966 and 1967 in the Willard J. La Morte Partnership account.

Q Mr. La Morte, I now show you Defendant's Exhibit X marked for identification.

MR. DERFNER: Mr. Palwick, you have a copy, do you not?

MR. PALWICK: Yes.

MR. DERFNER: I pass a copy to the Court, please.

Q Mr. La Morte, using Defendant's Exhibit X for identification to refresh your recollection --

MR. PALWICK: I object. The witness already has the two other exhibits that have these two figures and doesn't need Defendant's Exhibit X.

MR. DERFNER: I haven't asked the question. I haven't asked to put the exhibit in evidence either.

THE COURT: Mr. Palwick, I don't understand that. He is adding them up so we have the figure.

MR. PALWICK: I really think he can do that through testimony, he shouldn't put an exhibit --

THE COURT: Since the Court is not too good in arithmetic in any event, it probably would be helpful and is something certainly not hurtful to you. This is a resume that you made of the totals shown on Exhibit W and, I gather, on Exhibit U, is that right?

THE WITNESS: The two schedules, yes, sir, U and W, that's right, sir.

THE COURT: All right. If it is offered, it will be received.

MR. DERFNER: I am now offering it in evidence, your Honor.

THE COURT: All right.

(Defendant's Exhibit X was received in evidence.)

Q Would you just --

THE COURT: You don't have to go into that. He has already testified as to it. I know what it is. It is very clear what it is.

MR. DERFNER: Then, your Honor, on these schedules, I have no further questions.

We have other questions of the witness. Did you want to interpose questions at this point?

THE COURT: I want to either pose to you or to Mr. Feldshuh, these figures have been calculated on the basis of liability dating back only to 1965?

MR. FELDSHUH: That is correct, sir.

THE COURT: In the event that I disagree and agree with plaintiff that the liability can be figured back to 1963, and since the plaintiff takes the view that the liability is for the total partnership profits, if I were to take the view it goes back to 1963 but to agree with your contention, the defendant's contention, that at most he is only liable for his proportionate share, what evidence is in the record in that regard?

MR. PALWICK: I submit that this would have to be referred to a Special Master.

THE COURT: Really?

MR. PALWICK: There is no evidence. As a matter of fact, your Honor, the evidence here is not complete on liability up until 1965, because the first trades I note at least on some of those exhibits are sales in 1965.

Now, if those sales represented a profit over a purchase six months earlier, the liability even on his theory would have arisen within the two years.

THE COURT: I had assumed that there would be no contention on these figures. In any event, what I wanted

to find out was whether there was some figure similar to this that one could look to.

MR. PALWICK: We would come back to looking at Exhibits 11 and 12 which are pretty accurate as far as they go. We have had accountants for both parties come in.

THE COURT: Does that include 1963 transactions?

MR. PALWICK: That was the 1967 transactions where Mr. Weiss' firm came in and wrote those two letters, if you recall, Exhibit 11 and Exhibit 12.

THE COURT: And they go all the way back?

MR. PALWICK: Right.

MR. FELDSHUH: However, your Honor, even within the context of those figures, even if it did go back to 1963, but if your Honor were to hold that Mr. La Morte is liable only under 16(b) for his percentage of partnership profits, we would then, of course, come forward if there is a void as to that and I adopt Mr. Palwick's suggestion as Judge Cashin did in a case, he referred it to a Special Master since it is only a mathematical calculation.

MR. DERFNER: One point further at the risk of complicating matters. The calculations in Exhibits 11 and 12 have been figured by lumping all of these transactions together, which we contend is patently incorrect.

THE COURT: I understand.

MR. PALWICK: We are working within those parameters, anyway.

THE COURT: I understand. That is the reason I raised the question, because this was the first time that I had seen any evidence that had been introduced that purported to indicate Mr. La Morte's proportionate liability as a share of the partnerships, because in the other exhibits they were taken as total figures. It may well be that I will hold it reaches '65, but it could reach '63, and it may be I will hold, on what help you have given me, that Mr. La Morte is responsible, having a controlling interest and running these various partnerships.

I may adopt the plaintiff's theory. But then, again, I may not.

MR. FELDSHUH: I understand, sir.

THE COURT: I am not certain where I am going. In either case I wanted to be sure I had some guideposts.

MR. PALWICK: Your Honor, there are some holes in the testimony depending on what theory is taken in the case. In that case the mathematics would have to be referred, I submit, to a Special Master.

THE COURT: Thank you very much.

I am sorry I interrupted you.

MR. DERFNER: It is quite all right, your Honor.

Thank you.

MR. FELDSHUH: Your Honor, you will recall the stipulation that Mr. Palwick made, to wit, that there were matchings in Exhibits 11 and 12 --

MR. PALWICK: Would you read that statement, please? I didn't hear it.

(Record read)

MR. PALWICK: Go ahead.

MR. FELDSHUH: -- Exhibits 11 and 12 whereby they were matched against Mr. La Morte's direct holdings, partnership transactions, and that with regard to the testimony, of course, the testimony is that was direct holdings, there were no sales and purchases.

In that connection and in order to aid the Court, we have calculated out the number of transactions that were involved, also the number of shares in those transactions and the number of dollars that have been involved, and for that purpose I would like to offer just these two calculations.

Incidentally, on this, we did take both exhibits, the one that is predicated upon $8.75 and the one also that was predicated upon $10.75.

MR. PALWICK: I have gone a long way in permitting these exhibits to go in without the underlying fact, but I can't agree to bare figures.

BY MR. FELDSHUH:

Q Mr. La Morte, I show you this paper, sir, and I ask you with regard to the attached sheets, are the attached sheets identically the same as Plaintiff's Exhibit 11 in evidence? Would you just look at it, sir?

MR. FELDSHUH: Mr. Palwick, do you want to look over my shoulder so we can move along?

MR. PALWICK: What is the question?

MR. FELDSHUH: Just that this attachment is the same thing as Exhibit 11.

MR. PALWICK: Do you say so?

MR. FELDSHUH: I say so.

MR. PALWICK: I so stipulate.

MR. FELDSHUH: Fine.

Q Mr. La Morte, having looked at this attachment, did you examine it with respect to the shares that were received by you out of the Fireproof merger on or about February 1, 1966?

A Yes, sir, I did.

THE COURT: You mean received by Mr. La Morte personally?

MR. FELDSHUH: Yes, direct holdings, sir.

MR. PALWICK: In exchange for his shares of Fireproof.

Q Now, sir, in that connection you ticked off by markings those shares which were received by you and wherein the contract date of February 1, 1966 appears, is that right?

A That is correct, sir.

Q And did you go through all of those sheets and tick each place off?

A Yes, sir.

Q And did you then total the number of shares that were ticked off with respect to the date February 1, 1966, and representing your direct holdings?

A Yes, sir.

Q And what did that number come to?

A 13,300, sir.

Q Did you then --

MR. PALWICK: 13,300 what?

THE WITNESS: Shares.

Q Did you then, sir, make a list of the profits as reported adjacent to those numbers for those transactions and did you make that list?

A I did, sir.

Q And is that list on this yellow sheet of paper?

A It is, sir.

Q Sir, did you total that up?

A Yes, sir.

Q And did you compare your total with an adding machine tape, too?

A I did, sir.

Q And what was the total?

A $24,121.08.

Q And does this total of $24,121.08 represent the profits made by matching 13,300 of your direct holding shares?

A That is correct.

MR. FELDSHUH: I now offer this, your Honor.

MR. PALWICK: I object.

THE COURT: On what basis?

MR. PALWICK: On the basis that -- may I examine the defendant?

THE COURT: Go ahead.

VOIR DIRE EXAMINATION

BY MR. PALWICK:

Q When did you prepare this list?

A I believe it was the day before yesterday, sir.

Q And did you prepare it by comparing actual confirmations with the list represented by the plaintiff's exhibit?

A When you say "confirmation," I used that list there that is submitted in evidence, the one that was prepared

by Hain and Weiss and myself a long time ago and then Don Hain did all the matching mostly and that's what he showed, and he used my direct holdings against partnership holdings and I eliminated those from this list.

Q What process did you use in eliminating those from the list?

A Any place that there was a direct holding, I added it, I made a recording of it.

Q Using as a reference point 2/1/66, is that correct?

A That is correct.

MR. PALWICK: No objection.

(Defendant's Exhibit AC was received in evidence.)

Q Mr. Palwick --

MR. FELDSHUH: For the record, and assuming that you will make the same stipulation, I state to you that the attachment to these sheets is the same as the attachment on Exhibit 12.

MR. PALWICK: On that representation, I so stipulate.

Q Mr. La Morte, with regard to these sheets, did you examine them -- you know these sheets to be a calculation predicated upon a value of $10.75, is that right?

A That's correct, sir.

Q Did you go through these sheets and do the same thing that you did with respect to Defendant's Exhibit AC?

A Exactly the same, sir.

Q And you ticked off the placed which represent your direct holdings?

A That's correct, sir.

Q Having done that, sir, how many shares -- what was the total number of shares which were matched out of your direct holdings on the $10.75 price?

A 6,500 shares, sir.

Q Now, sir, did you total up the profits reported with respect to these 6500 shares?

A Yes, sir, I did.

Q And what was the amount of that profit?

A $3,628.22.

Q And did you also run a tape on that?

A I did.

Q And those two totals check out, is that right, sir?

A Yes.

MR. FELDMAN: I will offer it.

MR. PALWICK: No objection.

XXX (Defendant's Exhibit AD was received in evidence.)

MR. FELDSHUH: May I have a moment, sir?

THE COURT: Yes.

(Pause)

Q Mr. La Morte, I show you Defendant's Exhibit AF for identification, sir. Will you tell me what that is?

MR. PALWICK: What is AE?

THE CLERK: I never marked AE. AD was the last one.

MR. FELDSHUH: Then it is AE for identification.

Q What is that, sir?

A Sir, this is a notice of special meeting of shareholders to be held December 6, 1965, as sent out by the Fireproof Products Company, Inc.

Q At the time of this notice, did you receive one of these notices?

A Yes, sir. I was a shareholder of Fireproof.

MR. FELDSHUH: I offer it.

MR. PALWICK: This is AE?

MR. FELDSHUH: Yes, AE.

MR. PALWICK: I don't see how it is relevant but --

MR. FELDSHUH: Then object to it. Are you objecting?

MR. PALWICK: No.

THE COURT: I am about to object to it myself.

MR. FELDSHUH: This is the last one, your Honor, that we've got.

(Defendant's Exhibit AE was received in evidence.)

THE COURT: All right, Mr. Feldshuh.

Q Mr. La Morte, in connection with the merger and the Fireproof shares, do you know whether or not any Fireproof shares were turned in to the company, into Fireproof, for appraisal and purchase by the company?

A Yes, sir.

Q Were those by stockholders who did not agree to the merger?

THE COURT: There is already testimony in evidence.

MR. FELDSHUH: Then just one point.

THE COURT: Let me be sure that you and I are coming out on the same point. I don't want to cut you off on something that would be different.

MR. FELDSHUH: One point.

THE COURT: Wait a minute, Mr. Feldshuh. I probably am not speaking loud enough for you to hear me.

As I understand it, there is already testimony here that a group of minority stockholders objected to the sale.

MR. FELDSHUH: Right.

THE COURT: And that they sought an appraisal of

their stock.

MR. FELDSHUH: Right.

THE COURT: Is that the issue you are going to bring out?

MR. FELDSHUH: Yes.

THE COURT: It is already in evidence.

MR. FELDSHUH: I ask your Honor, may I ask the amount of money paid to these people per share?

THE COURT: Yes.

Q Sir, do you have knowledge of the amount of money paid with regard to the shareholders of Fireproof who did not consent to the merger per share?

A Yes, sir.

Q What was that amount?

MR. PALWICK: Objection; hearsay.

THE COURT: How do you have knowledge of it, Mr. La Morte?

THE WITNESS: Sir, there was a 1963 shareholders agreement, stockholders agreement, where the company would repurchase the individual stock for the book value at the end of each year.

THE COURT: And as a member of the board of directors of Fireproof you participated in the repurchase of these shares in question?

THE WITNESS: It was always customary, sir, year after year to do this with all the shareholders.

Q And how much did you pay, sir?

A It was approximately $140.

Q Predicated upon the book value as the same existed on December 31, 1964?

A That is correct, sir.

MR. FELDSHUH: No further questions, your Honor.

THE COURT: Mr. Palwick.

CROSS EXAMINATION

BY MR. PALWICK:

Q Mr. La Morte, you just testified certain shares were turned in for appraisal, is that correct?

A I testified certain shares were repurchased by the corporation.

Q Was there a demand for appraisal under New York or Delaware law?

A I cannot answer that.

Q What is your testimony with respect to these shares, then?

A That they were turned in as per the stockholders' agreement that had been in effect for many, many years.

Q To be repurchased at book value, is that correct?

A Yes, sir, approximate book.

Q And how long had that agreement been in existance?

A Since 196 -- I thought '63. It could have been maybe '61, sir.

MR. PALWICK: No further questions.

MR. FELDSHUH: No further questions.

THE COURT: Thank you.

(Witness excused.)

MR. FELDSHUH: The defendant rests.

THE COURT: Anything further from the plaintiff?

MR. PALWICK: Plaintiff rests.

THE COURT: Gentlemen, I want the post-trial briefs and I would like those post-trial briefs to be geared to the evidence that has been submitted.

How much time after the transcript would you need?

MR. PALWICK: I would want thirty days.

THE COURT: You want thirty days after you get the transcript?

MR. PALWICK: Yes, your Honor.

MR. FELDSHUH: Your Honor, I know I am going to be engaged in Washington. I am not sure of my calendar at this time, but the Multi District Panel has been in communication with us. As a matter of fact, I was supposed to be down there arguing today. If I find a substantial calendar conflict, I just want your Honor to know that I am

being held by Judge Bonsal as well, so I may have to come back to your Honor for perhaps a little additional time.

THE COURT: I am going to give both of you plenty of time. I don't want you to come back. So I am going to give you until June 1st, which seems to me to be plenty of time. If you get the transcript at the end of April, it is the 23rd now, if you get the transcript at the end of April you will have until June 1st to submit briefs.

MR. PALWICK: And proposed findings of law, your Honor?

THE COURT: Proposed findings of fact and law.

MR. PALWICK: We have findings of fact already submitted.

THE COURT: You may want to supplement those based on the testimony. I want this geared to the testimony and I want the briefs filed -- exchanged and filed simultaneously on the 1st of June. I don't expect anyone to ask me for any more time. I think I have given you sufficient time.

MR. FELDSHUH: Very well, sir.

THE COURT: Wait a minute. If in the event you want to reply to those, either of you, I will give you until the 11th of June to file a reply.

Is that clear?

MR. FELDSHUH: Yes, sir.

THE COURT: There are several things that I think I want you to devote your attention to, for me, at any rate. One, of course, I have already outlined. That is the issue of jurisdiction, which you have to do. The second one, of course, is clear, the date, when do we value the stock? Is it December 31, 1964, when the agreement was made to date and the date set, or was it the time the transaction took place?

The third question, of course, is whether Mr. La Morte is to be held responsible only for his proportionate share of the profits, if any, or is he, as a controlling partner that ran all these partnership enterprises, to be held for the partnership profit.

Then, obviously, finally, Mr. La Morte makes a counterclaim that he has overpaid and ought to be paid back, and I want that. Of course, obviously, any other things that any of you gentlemen feel that is of some importance, but those I might suggest to you are the things that would be important to me.

MR. FELDSHUH: Very well, your Honor.

THE COURT: Is there anything futther?

MR. PALWICK: No, your Honor.

MR. FELDSHUH: I can't think of anything. In the meantime, may I assume, your Honor, we will take our

respective exhibits and, of course, if Mr. Palwick wants a copy, he need only request it and if I want one I would assume Mr. Palwick will furnish me with one.

THE COURT: All right, gentlemen.

MR. FELDSHUH: Thank you very much, your Honor.

THE COURT: I will expect briefs on June 1st.

MR. PALWICK: Very well, your Honor.

MR. FELDSHUH: Yes, your Honor.

(Time noted, 3:00 p.m.)

- - - - -

I N D E X

Witnesses	Direct	Cross	Redirect	Recross
Donald C. Hain	15	45	105	
Raymond J. Davies	108			
Dugald J. Cameron	119	122	138	141
John G. Russell	142	159	192	
Willard J. La Morte	193 337	249 383		
Hugh A. McMullan, III	270	286	305	
Sam Weiss	306	335		

E X H I B I T S

Plaintiff's	For Identification	In Evidence
1		17
2		19
3		20
4		20
5		21
6		22
7		23
8		23
9		24
10		25
11		41
12		42

I N D E X

(Continuing)

+E X H I B I T S+

Plaintiff's	For Identification	In Evidence
13		96
14		109
15	207	208
16	213	
17	328	335
Defendant's		
A	36	266
B		267
C		267
D		267
E		268
F		268
G	270	
H	36	
I		129
J		131
K		133
L		134
M		135

I N D E X

(Continuing)

+E X H I B I T S+

Defendant's	For Identification	In Evidence
N	137	323
O		137
P		138
Q	145	
R		164
S	281	346
T		347
U		348
V		349
W		363
X		369
Y	315	3/6 ~~369~~
Z		317
AA		319
AB		320
AC		377
AD		378
AE		380

PLAINTIFF'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- X

SHATTUCK DENN MINING CORPORATION,

Plaintiff,

-against-

WILLARD J. LaMORTE,

Defendant.
- X

67 Civ. 3222

Calendar No. 504(4)

PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Plaintiff proposes the following findings of fact:

1. Plaintiff Shattuck Denn Mining Corporation ("Shattuck") is, and has been from prior to June 30, 1963, a corporation existing under the laws of the State of Delaware, with offices in the City and State of New York.

2. During all the times hereinbefore mentioned, the capital stock of Shattuck was an equity security registered on a national securities exchange, i.e., the American Stock Exchange.

3. From June 30, 1963, through June 14, 1967, defendant Willard J. LaMorte ("LaMorte") was an officer and director of Shattuck; and from June 14, 1967, through July 31, 1967, LaMorte was a director of Shattuck.

4. During the times hereinbefore mentioned LaMorte maintained a minority interest in four partnerships (the "Partnerships").

5. LaMorte had the "beneficial" interest in all shares held by the Partnerships because he controlled the trading of the Partnerships and controlled the voting of the Partnerships' shares.

6. Effective on February 1, 1966, The Fireproof Products Co. Inc. ("Fireproof") was merged into a subsidiary of

Shattuck; and Shattuck issued 13.21 shares of its stock for each share of Fireproof stock then outstanding.

7. Fireproof's shares were not traded on any national exchange or in the "over-the-counter" market.

8. The fair market value of Fireproof's shares was the equivalent of $7.57 for each share of Shattuck into which Fireproof's shares were converted or exchanged.

9. Upon the merger of Fireproof into Shattuck's subsidiary, shares of Fireproof then held by LaMorte were converted into shares of Shattuck.

10. Upon the merger of Fireproof into Shattuck's subsidiary, shares of Fireproof then held by the Partnerships were converted into shares of Shattuck.

11. During the period between July 2, 1965, and July 30, 1966, LaMorte and the Partnerships made sales of Shattuck's stock at prices in excess of $7.57 per share.

12. The profits on the said sales of the Shattuck shares, when matched with the $7.57 purchase price of Shattuck's shares on February 1, 1966, yielded a profit of $31,053.20.

13. Judgment should be entered in favor of Shattuck against LaMorte in the amount of $31,053.20, with interest, and with Shattuck's costs and disbursements of this action.

B. Plaintiff proposes the following conclusions of law:

1. This action arises under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78 p(b), and this Court has jurisdiction thereunder and under Section 27 of said Act, 15 U.S.C. § 78aa, as amended .

2. Defendant LaMorte is liable to the plaintiff for all profits made by the Partnerships by purchases and sales or sales and purchases within a six month period as prohibited by Section 16(b) of the Securities Exchange Act of 1934.

Dated: New York, N. Y.
June 1, 1973.

Respectfully submitted,

H.A. & C.E. Heydt
521 Fifth Avenue
New York, N. Y. 10017
972-0500

Alan Palwick
Of Counsel

DEFENDANT'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

SHATTUCK DENN MINING CORPORATION,

Plaintiff,

- against -

WILLARD J. LA MORTE,

Defendant.

- x

67 Civ. 3222

Calendar No. 504(4)

DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Shattuck Denn Mining Corporation ("Shattuck") is, and at all times herein relevant was, a Delaware corporation doing business in the State of New York.

2. At all times herein relevant, Shattuck's capital stock was an equity security registered on the American Stock Exchange.

3. The defendant, Willard J. La Morte ("La Morte") was an officer and director of Shattuck from June 30, 1963 through June 14, 1967; and a director of Shattuck from June 14, 1967 through ~~July 31, 1967.~~ May 15, 1968

4. Willard J. La Morte, Partnership ("Partnership") and Willard J. LaMorte, Agent ("Agent") were joint ventures formed for the purpose of trading in securities.

5. La Morte held minor participating interests in both Partnership and Agent.

6. On December 3, 1964, the Shattuck Board of Directors approved, in principle, a merger plan whereby The Fireproof Products Co. Inc. ("Fireproof") would merge into Shattuck.

7. Pursuant to the merger plan, an exchange ratio of 13.21 shares of Shattuck to one share of Fireproof was agreed upon.

8. The exchange ratio was based upon the mean market value of Shattuck on December 3, 1964 and the book value of Fireproof on December 31, 1964.

9. On February 1, 1966, the Shattuck and Fireproof shares were exchanged at the rate of 13.21 to 1.

10. The value of the Shattuck shares acquired pursuant to the merger was $15.14 per share. Pursuant to the merger, Agent acquired 5,651 shares of Shattuck stock; Partnership did not acquire any shares of Shattuck stock.

11. During the year 1966, Partnership realized, by trading in Shattuck stock, a short-swing profit of $1,209.82.

12. From January 1, 1967 until August 23, 1967, Partnership realized, by trading in Shattuck stock, a short-swing profit of $15,985.28.

13. During the year 1966, Agent realized, by trading in Shattuck stock, a short-swing profit of $232.96.

14. La Morte's proportionate share of Partnership's 1966 short-swing profit was $413.43.

15. La Morte's proportionate share of Partnership's 1967 short-swing profit was $5,642.80.

16. La Morte's proportionate share of Agent's 1966 short-swing profit was $26.04.

17. La Morte's total 16(b) liability for short-swing profits is $6,082.30.

18. In 1967, La Morte paid Shattuck $40,135.53, believing that this sum represented his 16(b) liability.

19. Shattuck received an excess of $34,113.23 from La Morte.

CONCLUSIONS OF LAW

1. This action arises under Section 16(b) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78 p(b), and this Court has jurisdiction thereunder.

2. Shattuck may not recover short-swing profits realized by La Morte prior to August 24, 1965.

3. The Fireproof shares exchanged pursuant to the merger with Shattuck must be valued as of December 31, 1964.

4. LaMorte is liable only for his proportionate share of the short-swing profits realized by Partnership and Agent.

5. La Morte is entitled to judgment on his counter-claim.

Dated: New York, New York
June 1, 1973

Respectfully submitted,

FELDSHUH & FRANK
144 East 44th Street
New York, New York 10017
687-8930

To: H. A. & C. E. HEYDT
521 Fifth Avenue
New York, New York 10017
972-0500

OPINION OF CARTER, J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHATTUCK DENN MINING CORP., :

Plaintiff, : #40435

-against- : Index No. 67 Civ. 3222

WILLARD J. LA MONTE, :

Defendant. :

FILED
U.S. DISTRICT COURT
S.D. OF N.Y.
Mar 8 9 57 AM '74

MEMORANDUM OPINION

This action was brought under Section 16(b) of the Securities and Exchange Act of 1934, 15 U.S.C. §78p(b)[1] to recover "short swing" profits allegedly realized from trading in plaintiff's stock between July 30, 1963 and July 31, 1967 by defendant, an "insider" at the time in plaintiff corporation. Jurisdiction exists under 15 U.S.C. §78aa.

---

[1]Section 78p(b) provides, in pertinent part:

> "(b) For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted

[Footnote continued on following page.]

Plaintiff is a corporation existing under the laws of the State of Delaware. It is a publicly held company with its capital stock registered on the American Stock Exchange. From June 30, 1963 through July 14, 1967 defendant, Willard La Monte, was an officer and director of Shattuck Denn, and from June 14, 1967 through July 31, 1967, defendant was a director of the plaintiff corporation. Defendant during this period held an interest in various partnerships which were joint ventures formed for the purpose of trading in securities. The partnerships held a controlling interest in Fireproof Products Co., a closely held corporation, whose stock was not traded over the counter or on any national exchange.

[Footnote continued on following page.]

security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. . . ."

On December 31, 1964 the Shattuck Denn Board of Directors proposed in principle a merger plan pursuant to which Fireproof would merge into Shattuck Denn. Under the merger agreement Fireproof shareholders were to receive, when the merger was consummated, 1.321 shares of Shattuck Denn stock in exchange for each share of Fireproof stock. This agreed upon formula was arrived at on the basis of $141.85 book value accorded Fireproof stock and $10.85 market value of Shattuck Denn stock as of December 31, 1964. The merger did not take place until February 1, 1966, at which time the book value of Fireproof stock had risen and the market value of Shattuck Denn stock had fallen to $8.75.

During the period in question, July 30, 1963 to July 31, 1969, the defendant made purchases and sales of Shattuck Denn stock within the six-month restriction, and pursuant to the "profits" disclosed by those transactions on the various Forms 4 filed with the Securities and Exchange Commission, paid plaintiff a total of $40,289.62, constituting the total "short swing" profits realized by the various partnerships to which defendant belonged that had traded in Shattuck Denn securities. In 1967 defendant filed a Form 4 with the Securities and Exchange Commission which for the first time listed various partnership trades in Shattuck Denn stock not heretofore revealed.

Plaintiff brought this action seeking recovery of those now disclosed "short swing" profits.

Rule 16(b) requires that suit to recover profits made in violation of its proscriptions be instituted "within two years after the date such profit was realized." Plaintiff here seeks recovery of profits realized since 1963, four years before this litigation commenced. This threshold jurisdiction issue, however, need not delay us long. It has long been an established rule in the federal courts that the time limitation bars in federal statutes do not begin to run where fraud is involved until the fraud is discovered. Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946). Here the mere violation of the statutory policy by trading by an insider, Blau v. Albert, 157 F. Supp. 816, 819 (S.D.N.Y. 1957), as well as failure to provide proper information on Form 4 as required by Rule 16a, Grossman v. Young, 72 F. Supp. 375 (S.D.N.Y. 1947), constitutes fraud which tolled the running of the two-year limitation. In this instance, the two-year period did not begin to run, therefore, until August, 1967 when defendant revealed on Form 4 transactions in the plaintiff corporation's stock not theretofore revealed. Plaintiff's suit to recover "short swing" profits realized in those transactions was brought timely.

The stock in question in this litigation is that stock which defendant and his partners received in exchange for their Fireproof shares on the merger of Fireproof and Chattuck Denn on February 1, 1966. The transactions emanating from the merger are clearly the kinds of dealings lending themselves to speculative abuse which Rule 16(b) was designed to prevent. See Newmark v. RKO General, Inc., 425 F. 2d 348 (2d Cir. 1970), cert. denied, 400 U.S. 854 (1970).

In determining defendant's "short swing" profits pursuant to the transactions arising from the merger it is necessary to determine the fair value of the Fireproof stock which was given up for the Chattuck Denn shares. See [illegible] v. Ayer, 317 F. Supp. 254 (S.D.N.Y. 1970). Since Fireproof was a closely held corporation, to arrive at an accurate figure for the market value of its stock is difficult. There are considerations, of course, which are helpful in arriving at a fair appraisal of the worth of this type of corporation. The experts for both sides agreed that the critical factors to be assessed included the history and nature of the business, the particular industry, the state of the general economy, the area where the corporation is located, historical and prospective earnings of the company, its underlying assets, book

value and the capitalization of prospective earnings into value. While the experts agreed on virtually all factors to be taken into account, plaintiff's expert set the value of Fireproof stock at $100 per share and defendant's at $200 per share. These divergent conclusions could hardly be classified as purely objective findings.

Where the market value of what was given up is difficult to define, the market value of what was received may be utilized to determine the value of what was given up. See B.F. Babbitt, Inc. v. Marshall S. Lochner, 332 F. 2d 255 (2d Cir. 1964); Marquette Cement Manufacturing Co. v. Andreas, 239 F. Supp. 962 (S.D.N.Y. 1965); Stella v. Graham-Paige Motors Corp., 232 F. 2d 299 (2d Cir. 1956).

Defendant argues that market value should be determined as of December 31, 1964, the time the merger was agreed to in principle by the Shattuck Board of Directors, even though the merger was not effectuated until thirteen months later. That argument has no merit. The parties were not irrevocably bound on December 31, 1964, see Newmark v. RKO General, Inc., supra; Booth v. Varian Associates, 334 F. 2d 1 (1st Cir. 1964); Chemical Home Builders Co. v. Elson B. Jeffress, 352 F.Supp. 1081 (E.D. Mich. 1973), and therefore, the date the merger went into effect is the appropriate date for determining market value.

On that date, February 1, 1966, it is agreed that the market value of Shattuck Denn stock was $8.75. Using the agreed upon formula of 13.21 shares of Shattuck Denn stock for each share of Fireproof, we can determine that the value of Fireproof shares was $115.58 each. Since defendant was delivering to Shattuck through the Fireproof holdings of his various trading partnerships a controlling interest in Fireproof, a premium of 15% should be added, see Newmark v. RKO General, Inc., 283 F. Supp. 310 (S.D.N.Y. 1969); and see Heller v. Korholz, 449 F. 2d 82 (7th Cir. 1971), cert. denied sub. nom. Wolff v. Korholz, 405 U.S. 922 (1972), increasing the value of the defendant Fireproof shares to $139.91 per share and bringing the cost to him of each Shattuck Denn share received to $10.06. Rounding that figure out to $10 per share to ease the arithmetic calculations, we find that defendant's various partnerships made $4,875.00 in "short swing" profits in transactions with Shattuck Denn stock secured in exchange for the Fireproof stock, in addition to what he has already paid defendant.

Defendant sought at trial to amend his answer in respect of the counterclaim for overpayment on the theory that he had paid plaintiff all profits the partnership had realized, not his pro rata share of those gains.

Plaintiff resists the allowance of any such amendment arguing that because the defendant waited so long to assert a mere pro rata liability in the partnership profits in question, the statute of limitations has now run in respect of plaintiff's right to proceed against the other partners.

The court is entitled, of course, to conform the pleadings to the facts where the facts and circumstances justify such remedial action. See SEC v. Ramp, 304 F. 2d 785 (2d Cir. 1962). If such a change would result in inequitable consequences for the other party, the court has, of course, authority not to allow the amendment. In that connection, the critical question is whether plaintiff had the right to proceed against any of the other parties.

Plaintiff argues that defendant is accountable for all profits of the partnership on the theory that he was deputized by the partnerships to represent them on the Shattuck Denn Board. See Feder v. Martin Marietta Corp., 406 F. 2d 260 (2d Cir. 1969). There was no deputization in this case. The partnerships, as indicated, were joint ventures formed for the purpose of trading in securities. There were no affairs of the partnerships which defendant was protecting or policies which he was

seeking to promote as an officer and member of the Chattuck Denn Board which was designed to benefit the partnerships. The purpose of these trading partnerships was to make money for its members by speculative trading in stock. Ordinarily, therefore, defendant would be liable to plaintiff only for his proportionate share of the partnership profits. See Blau v. Lehman, 286 F.2d 786 (2d Cir. 1961), affirmed, 368 U.S. 403 (1962); Rattner v. Lehman, 193 F. 2d 564 (2d Cir. 1952).

Whether equity requires that plaintiff be allowed to keep whatever defendant has paid it in excess of its due depends on whether any partners other than defendant were insiders within the meaning of Rule 16(b). The record shows that Mr. Cameron, defendant's partner in one of the partnerships that traded illegally in plaintiff's stock, was a member of the Chattuck Denn Board. Whether he was a member of the partnership, as well as a member of the Board during the critical period in question has not been developed. Nor has the relationship of the other parties to the plaintiff corporation been developed. Defendant should not now, therefore, be permitted to interpose a defense of pro rata liability at a time when plaintiff cannot sue other partners.

Therefore, the pro rata liability question is raised too late. Judgment will be entered against defendant for all of the newly discovered "short swing" profits in accordance with this opinion.

SETTLE ORDER.

Dated: New York, New York
March 7, 1974

ROBERT L. CARTER
U.S.D.J.

JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHATTUCK DENN MINING CORP.,
Plaintiff,

67 Civ. 3222

-against-

JUDGMENT

WILLARD J. LA MORTE,
Defendant.

This action came on for hearing before the Court, Honorable Robert L. Carter, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered it is

ORDERED AND ADJUDGED that the plaintiff, Shattuck Denn Mining Corp., recover of the defendant, Willard J. LaMorte, the sum of Four Thousand Eight Hundred and Seventy-Five ($4,875) Dollars, and its costs of this action.

Dated at New York, N.Y., this 10th day of May, 1974.

s/ Raymond F. Burghardt
Clerk of Court

NOTICE OF APPEAL OF WILLARD J. LA MORTE, DEFENDANT

Original filed 6/4/74

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHATTUCK DENN MINING CORP.,

Plaintiff,

-against-

WILLARD J. LA MORTE,

Defendant.

67 Civ. 3222 Judge Carter

NOTICE OF APPEAL

Notice is hereby given that WILLARD J. La MORTE, defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the Final Judgment granting judgment in favor of plaintiff against defendant in the amount of Four Thousand Eight Hundred Seventy Five ($4,875) Dollars entered in this action on the 10th day of May, 1974.

Dated: New York, New York
May 29, 1974

FELDSHUH & FRANK

by /s/ Sidney Feldshuh
SIDNEY FELDSHUH
A Member of the Firm
Attorneys for Defendant
Willard J. LaMorte
144 East 44th Street
New York, New York 10017
(212) 687-8930

TO: Clerk, United States
District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Burns, Van Kirk, Greene &
Kafer, Esqs.
Attorneys for Plaintiff
521 Fifth Avenue
New York, New York 10017

NOTICE OF APPEAL OF SHATTUCK DENN MINING CORP., PLAINTIFF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

SHATTUCK DENN MINING CORP.,

Plaintiff,

-against-

WILLARD J. LA MORTE,

Defendant.

- -x

67 Civ. 3222

NOTICE OF APPEAL

Notice is hereby given that SHATTUCK DENN MINING CORP, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the Final Judgment granting judgment in favor of plaintiff against defendant in the amount of Four Thousand Eight Hundred Seventy Five ($4,875) Dollars entered in this action on the 10th day of May, 1974.

Dated: New York, New York
June 13, 1974

BURNS, VAN KIRK, GREENER & KAFER

by _____
ALAN PALMACK
A Member of the Firm
Attorneys for Plaintiff
521 Fifth Avenue
New York, N.Y. 10017

TO: Clerk, United States
District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Feldshuh & Frank, Esqs.
Attorneys for Defendant
WILLARD J. LA MORTE
144 East 44th Street
New York, New York 10017

Shattuck v LaMonte

STATE OF NEW YORK)
: SS:
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 4 day of Oct 1974 deponent served the within Appendix upon Feldshuh Frank

attorney(s) for appellee

in this action, at 144 East 44 St.
New York, N.Y. 10017

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this
4 day of Oct. 1974

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976